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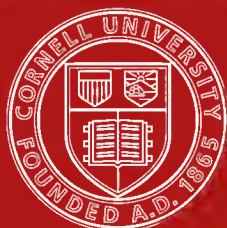
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**Nomination of Louis D. Brandeis.Hearings**



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# NOMINATION OF LOUIS D. BRANDEIS

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## HEARINGS

BEFORE THE

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE, ON THE NOMINATION OF LOUIS  
D. BRANDEIS TO BE AN ASSOCIATE JUSTICE OF THE  
SUPREME COURT OF THE UNITED STATES,

TOGETHER WITH

THE REPORT OF THE SUBCOMMITTEE OF THE  
COMMITTEE ON THE JUDICIARY THEREON

---

IN TWO VOLUMES

REPRINT OF VOL. 2  
WITH ADDITIONAL MATTER



*37017-*  
SUBMITTED BY MR. CHILTON.

IN THE SENATE OF THE UNITED STATES,  
*May 31 (ca endar day, June 1), 1916.*

*Ordered*, That there be printed as part 2, of Senate Document No. 409, the additional evidence (part 22 of the hearings) taken before the subcommittee of the Committee on the Judiciary and the report of the Committee on the Judiciary to the Senate, with the views of the minority, on the nomination of Louis D. Brandeis; that 1,000 extra copies thereof be printed for the use of the Senate, to be distributed through the folding room, and that 500 additional copies be printed for the use of the Committee on the Judiciary.

Attest:

JAMES M. BAKER,  
*Secretary.*

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## NOMINATION.

Committee  
Docket No. 24:

LOUIS D. BRANDEIS,

of Massachusetts, to be associate justice of the  
Supreme Court of the United States, vice Joseph  
Rucker Lamar, deceased.

1916.

- Jan. 28. Referred to the Committee on the Judiciary.  
Jan. 31. Referred to the following subcommittee:  
Messrs. Chilton, chairman,  
Fletcher,  
Walsh,  
Clark of Wyoming, and  
Cummins.  
Feb. 16. Mr. Works appointed vice Mr. Clark.  
Apr. 3. Subcommittee reported favorably: Recommending con-  
firmation, Messrs. Chilton, Fletcher, and Walsh; recom-  
mending rejection, Messrs. Cummins and Works.  
Individual views of members of subcommittee ordered  
printed together and made public.  
May 10. Recommitted to same subcommittee, with Mr. Borah to  
sit temporarily vice Mr. Cummins (absent), with spe-  
cific instructions.  
May 15. Subcommittee reported favorably: Recommending con-  
firmation, Messrs. Chilton, Fletcher, and Walsh; recom-  
mending rejection, Messrs. Borah and Works.  
May 24. Ordered reported to the Senate with the recommendation  
that it be confirmed.



# NOMINATION OF LOUIS D. BRANDEIS.

FRIDAY, MAY 12, 1916.

UNITED STATES SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The subcommittee met at the call of the chairman in the room of the Committee on the Judiciary, in the Capitol Building, at 10.30 o'clock a. m., in compliance with the direction of the Committee on the Judiciary that further evidence be taken in regard to the connection of the nominee, if any, with the "proposed united drug merger."

Present: Senators Chilton (chairman), Borah, and Works, Senator Borah having been appointed to sit temporarily as a member of the subcommittee in the absence of Senator Cummins.

(The following correspondence was ordered inserted in the record:)

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D. C., May 5, 1916.*

DEAR MR. PRESIDENT: As you are aware, the Committee on the Judiciary of the Senate has under consideration the nomination of Mr. Louis D. Brandeis for Associate Justice of the Supreme Court of the United States.

In response to the formal and usual request of the Committee made to the Attorney General for all papers in the possession of his Department touching this nomination, he replied that there were no such documents in his Department.

Inasmuch as this request usually results in the presentation to the Committee on the Judiciary of papers showing the reasons which actuated the President in making the nomination, I would be glad to have you state these reasons, for the benefit of the Committee, in case you see no objection to so doing.

Very sincerely yours,

C. A. CULVERSON.

To the PRESIDENT,  
*The White House.*

THE WHITE HOUSE,  
*Washington, May 5, 1916.*

MY DEAR SENATOR: I am very much obliged to you for giving me an opportunity to make clear to the Judiciary Committee my reasons for nominating Mr. Louis D. Brandeis to fill the vacancy in the Supreme Court of the United States created by the death of Mr. Justice Lamar, for I am profoundly interested in the confirmation of the appointment by the Senate.

There is probably no more important duty imposed upon the President in connection with the general administration of the Government than that of naming members of the Supreme Court; and I need hardly tell you that I named Mr. Brandeis as a member of that great tribunal only because I knew him to be singularly qualified by learning, by gifts, and by character for the position.

Many charges have been made against Mr. Brandeis: the report of your subcommittee has already made it plain to you and to the country at large how unfounded those charges were. They threw a great deal more light upon the character and motives of those with whom they originated than upon the

qualifications of Mr. Brandeis. I myself looked into them three years ago when I desired to make Mr. Brandeis a member of my Cabinet and found that they proceeded for the most part from those who hated Mr. Brandeis because he had refused to be serviceable to them in the promotion of their own selfish interests, and from those whom they had prejudiced and misled. The propaganda in this matter has been very extraordinary and very distressing to those who love fairness and value the dignity of the great professions.

I perceived from the first that the charges were intrinsically incredible by anyone who had really known Mr. Brandeis. I have known him. I have tested him by seeking his advice upon some of the most difficult and perplexing public questions about which it was necessary for me to form a judgment. I have dealt with him in matters where nice questions of honor and fair play, as well as large questions of justice and the public benefit, were involved. In every matter in which I have made test of his judgment and point of view I have received from him counsel singularly enlightening, singularly clear-sighted and judicial, and, above all, full of moral stimulation. He is a friend of all just men and a lover of the right; and he knows more than how to talk about the right,—he knows how to set it forward in the face of its enemies. I knew from direct personal knowledge of the man what I was doing when I named him for the highest and most responsible tribunal of the nation.

Of this extraordinary ability as a lawyer no man who is competent to judge can speak with anything but the highest admiration. You will remember that in the opinion of the late Chief Justice Fuller he was the ablest man who ever appeared before the Supreme Court of the United States. "He is also," the Chief Justice added, "absolutely fearless in the discharge of his duties."

Those who have resorted to him for assistance in settling great industrial disputes can testify to his fairness and love of justice. In the troublesome controversies between the garment workers and manufacturers of New York City, for example, he gave a truly remarkable proof of his judicial temperament and had what must have been the great satisfaction of rendering decisions which both sides were willing to accept as disinterested and even-handed.

Mr. Brandeis has rendered many notable services to the city and state with which his professional life has been identified. He successfully directed the difficult campaign which resulted in obtaining cheaper gas for the City of Boston. It was chiefly under his guidance and through his efforts that legislation was secured in Massachusetts which authorized savings banks to issue insurance policies for small sums at much reduced rates. And some gentlemen who tried very hard to obtain control by the Boston Elevated Railway Company of the subways of the city for a period of ninety-nine years can probably testify as to his ability as the people's advocate when public interests call for an effective champion. He rendered these services without compensation and earned, whether he got it or not, the gratitude of every citizen of the state and city he served. These are but a few of the services of this kind he has freely rendered. It will hearten friends of community and public rights throughout the country to see his quality signally recognized by his elevation to the Supreme Bench. For the whole country is aware of his quality and is interested in this appointment.

I did not in making choice of Mr. Brandeis ask for or depend upon "endorsements." I acted upon public knowledge and personal acquaintance with the man, and preferred to name a lawyer for this great office whose abilities and character were so widely recognized that he needed no endorsement. I did, however, personally consult many men in whose judgment I had great confidence, and am happy to say was supported in my selection by the voluntary recommendation of the Attorney General of the United States, who urged Mr. Brandeis upon my consideration independently of any suggestion from me.

Let me say by way of summing up, my dear Senator, that I nominated Mr. Brandeis for the Supreme Court because it was, and is, my deliberate judgment that, of all the men now at the bar whom it has been my privilege to observe, test, and know, he is exceptionally qualified. I cannot speak too highly of his impartial, impersonal, orderly, and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions and insight into their spirit, or of the many evidences he has given of being imbued to the very heart with our American ideals of justice and equality of opportunity; of his knowledge of modern economic conditions and of the way they bear upon the masses of the people, or of his genius in getting persons to unite in common and harmonious action and look with frank and kindly eyes into each other's minds, who had before been heated antagonists. This friend of justice and of men will ornament the

high court of which we are all so justly proud. I am glad to have had the opportunity to pay him this tribute of admiration and of confidence; and I beg that your Committee will accept this nomination as coming from me quick with a sense of public obligation and responsibility.

With warmest regard,

Cordially and sincerely yours,

WOODROW WILSON.

HON. CHARLES A. CULBERSON,  
*United States Senate.*

Senator CHILTON (at 10.45 o'clock a. m.). Senator WORKS, do you know about this new evidence that is to be offered? I confess that I do not know how to present it. I understand some witnesses are here this morning. I suppose they may be examined.

Senator WORKS. Mr. Chairman, all I know about it is a statement of some facts that was furnished me by Senator Sutherland. I have tried to extract from that rather long statement some of the facts connected with it. If Mr. Liggett will take the stand I would like to ask him about that.

(At this point Messrs. Louis K. Liggett, Frederic E. Snow, and George W. Anderson were sworn by Senator Chilton.)

#### TESTIMONY OF LOUIS K. LIGGETT, OF BOSTON, MASS.

(Mr. Liggett took the witness stand at 10.50 o'clock a. m.)

Senator CHILTON. Senator WORKS, will you proceed with the examination?

Senator WORKS. I will if the chairman requests it. I am perfectly willing that the chairman shall conduct the examination.

Senator CHILTON. I am not familiar enough with what is proposed to be elicited from the witness to feel like going forward.

Senator WORKS. Mr. Liggett, what is your business?

Mr. LIGGETT. Manufacturer and retailer.

Senator WORKS. Of what?

Mr. LIGGETT. Drugs.

Senator WORKS. With what companies are you connected?

Mr. LIGGETT. The United Drug Co. as president, and chairman of the board of directors of the Liggett Co.

Senator WORKS. What is the connection between those two companies?

Mr. LIGGETT. That of parent and subsidiary company.

Senator WORKS. What do you mean by that?

Mr. LIGGETT. The Liggett Co. is a direct subsidiary of the United Drug Co., the United Drug Co. owning all the capital stock of the Liggett Co.

Senator WORKS. What other companies are connected with the Liggett Co. or the United Drug Co.?

Mr. LIGGETT. Several more subsidiary companies—the United Drug Co. (Ltd.) of Canada, the National Cigar Stands Co. of New York, the Guth Chocolate Co. of Baltimore, the Ballardvale Springs Co., the United Candy Co., and the United Pharmaceutical Co. To the best of my recollection that is all.

Senator BORAH. Does the parent company control all the stock of all these subsidiary companies?

Mr. LIGGETT. It owns all the stock of all these companies with the exception of a small amount of preferred stock in the United

Drug Co. (Ltd.) of Canada, a small amount of preferred stock in the Guth Chocolate Co., and a small amount of the preferred stock of the Ballardvale Springs Co. It owns all the common shares of all the companies.

Senator WORKS. I have here a memorandum of some alleged facts relating to the connection between these companies, and I want to call your attention specifically to these statements, so that you may either verify them or correct any mistake in connection with them.

It is said, first, that the merger of the Riker & Hegeman Co. chain of drug stores and the United Drug Co. brings under the same control nearly 200 retail drug stores and 3,500 agents of the National Cigar Stands Co. affiliated with the United Drug Co. Does that state the facts about correctly?

Mr. LIGGETT. A little less number of retail stores; about 153 is correct.

Senator WORKS. Instead of 200?

Mr. LIGGETT. Instead of 200.

Senator WORKS. How about the agencies—3,500 agents?

Mr. LIGGETT. I could not give the exact number offhand, but it is approximately correct.

Senator WORKS. Then, again, it is stated that the United Drug Co. of Massachusetts was a \$20,000,000 corporation which controlled the United Drug Co. of New Jersey, the F. L. Daggett Co., the National Cigar Stands Co., the L. K. Liggett Co., the United Drug Co. (Ltd.) of Canada, and owned substantial holdings in the Hanson-Jenks Co. and Ballard Vale Co., and had working arrangements with approximately 7,000 other stores throughout the country, and through its cigar department operated by the National Cigar Stands Co. had 3,500 agencies in various parts of the country. Does that state the facts correctly prior to the final merger that took place?

Mr. LIGGETT. Approximately correctly.

Senator WORKS. Then, again, it is stated that the Riker & Hegeman Co. is a \$15,000,000 corporation organized in 1912 to take over the chain of stores of William B. Riker & Co., Hegeman & Co., and the Jaynes Drug Co., and owned and operated over 100 stores in New York, Brooklyn, Boston, Hartford, Newark, Philadelphia, Pittsburgh, Washington, and other eastern cities. Does that state the facts correctly?

Mr. LIGGETT. As far as I know.

Senator WORKS. How far do you know?

Mr. LIGGETT. I was not a member of their organization, and I can not state that in 1912 they did take over those businesses.

Senator WORKS. You have become connected with some of those corporations since?

Mr. LIGGETT. We have taken over what was the Riker-Hegeman Co. as it existed at the beginning of this year.

Senator WORKS. We will come to that directly, I think.

It is stated that in 1913 the control of the Riker & Hegeman Co. stock was acquired by the United Cigar Stores Co. interest, headed by George J. Whelen, and the stock of the company was put into the corporation for R.-H. stock which Mr. Whelen and his associates controlled. Mr. Whelen took active charge of the Riker & Hegeman affairs and a number of Mr. Whelen's strongest associates

in the United Cigar Stores Co. came over and took hold of the management of the Riker & Hegeman Co. What is the fact as to that?

Mr. LIGGETT. My information is to the effect that the United Cigars Stores Co. as an organization had nothing to do with that; that it was simply an individual promotion plan of Mr. Whelen's; that the stock of the Delaware corporation, known as the R. H. Corporation, was not largely held by stockholders of the United Cigar Stores Co., but rather by independent stockholders, and I believe that to be true, because in the purchase of the business I had to check their stock lists. By long odds a majority of the stock was held by investors.

Senator WORKS. Then we will go to the next statement.

In September of last year it was announced that the United Drug Co. interest was negotiating with Mr. Whelen, of the United Cigar Stores, and his associates for the control of the Riker & Hegeman chains. On October 17 it was announced that the transfer had been arranged and that a special meeting of the Riker & Hegeman stockholders would be called to ratify the merger. What is the fact about that?

Mr. LIGGETT. That is about correct.

Senator WORKS. Then again, soon after it became public that the Department of Justice was investigating the Riker & Hegeman chain of stores to determine whether prosecutions should be begun under the Sherman Antitrust Act on the complaints which had been coming into the Department of Justice from independent retail druggists of different parts of the country. Had you notice of any such investigation being made by the Department of Justice?

Mr. LIGGETT. No; my only notice came through the action of Mr. Anderson, the district attorney in Boston, and I rather have assumed and believe it to be the fact that this was initiated by him, not on complaints but rather purely on his own initiative.

Senator WORKS. When were you first made aware of the fact that Mr. Anderson was investigating the situation?

Mr. LIGGETT. The 1st of October.

Senator WORKS. What was the state of the negotiations which finally resulted in the ultimate merger, when you first learned of that fact?

Mr. LIGGETT. As far as the principals controlling the majority of stock of the company was concerned, the agreement had been made between them.

Senator WORKS. Then again, it was then claimed that the proposed merger of the Riker & Hegeman Co. with the United Drug Co. would combine retail interests estimated to be doing an annual business of \$30,000,000, and that the matter was being investigated by the Attorney General. What was the fact about it, as to the interests that would be included if the merger took place?

Mr. LIGGETT. The volume of retail business for the year 1915, when the business was conducted separately, would of course have made the combined business approximately \$20,000,000, not \$30,000,000.

Senator WORKS. How many different stores would be included in the merger?

Mr. LIGGETT. One hundred and fifty-three.

Senator WORKS. Where? Located in how many different States?

Mr. LIGGETT. Located, the largest number, in New York City in one group; the second largest in the New England States, including all States of New England, excepting Vermont, and having but one store in New Hampshire and three stores in Maine. The rest of the business was distributed in New York State, largely in the principal cities along the New York Central Railroad; a few in Pennsylvania, three being in Philadelphia, and two in Pittsburgh, one in Scranton, one in Wilkes-Barre, and one in Lancaster; one in Washington and three in Detroit.

Senator BORAH. Washington, D. C.?

Mr. LIGGETT. Washington, D. C. Three in Detroit; two in Columbus, Ohio; two in Toronto, Ontario; and five in Winnipeg.

Senator WORKS. Since that time has the number of stores under your control been increased?

Mr. LIGGETT. Decreased by four.

Senator WORKS. Where?

Mr. LIGGETT. One in Providence; one in Troy, N. Y.; one in Paterson, N. J.; and for the minute I can not think where the fourth place is.

Senator WORKS. Again, it is stated that the meeting of the Riker & Hegeman stockholders held for the purpose of ratifying the merger with the United Drug Co. was to have been held early in December, but was postponed from time to time on the explanation that the lawyers required more time to take care of the details of the merger. What is the fact about that?

Mr. LIGGETT. That is correct. There was a great deal of difficulty in the beginning in the Delaware corporation arranging for the deposit of their stock, and there were numerous technicalities that came up, purely legal, pertaining to the merger only, which delayed the meeting from time to time, but they were entirely on the part of the Riker & Hegeman corporation.

Senator WORKS. Was that the only reason for postponing the final action bringing about the merger?

Mr. LIGGETT. Yes.

Senator WORKS. Did the fact that the Department of Justice was threatening to investigate have anything to do with it?

Mr. LIGGETT. Nothing whatever.

Senator WORKS. You had learned of that fact at that time?

Mr. LIGGETT. Yes.

(At this point, 11.01 o'clock a. m., the bell announced a call for a quorum in the Senate.)

Senator WORKS. Next, it is stated that Louis D. Brandeis is understood to have been retained during this period for some of the parties in interest, for the purpose of preparing an opinion and taking part in the negotiations with United States District Attorney Anderson and with the Department of Justice. What do you know about that?

Mr. LIGGETT. In the latter part of October, I think somewhere about the 22d or possibly the 25th of October, one of the two dates, I went to Mr. Anderson's office with my counsel, Mr. Snow, at the request of Mr. Anderson, to make a full statement regarding the merger and the policies of the United Drug Co. previous to, and what they

might be following, the merger; going, as we expressed it, to lay our cards on the table.

Mr. Anderson's point of view at that time was, as I felt, very arbitrary; and as we left his office Mr. Snow, in answer to some statement that I made regarding Mr. Anderson's position, said that he felt positive that Mr. Anderson was wrong in his view of the case, and he said, as nearly as I can recall it, that he had always represented the corporate interests in matters of this kind.

Senator BORAH. That is, Mr. Snow?

Mr. LIGGETT. Mr. Snow had always represented corporate interests in matters of this kind, and that while he did believe that Mr. Anderson was wrong it was possible that some one else who had represented interests other than corporate interests might have a different viewpoint to give Mr. Snow, and that he thought he would like to consult with some one. I asked him whom he had in mind. His answer was that there was only one man that he cared to put the question up to, and that was Mr. Brandeis, and I replied, "Why don't you get Mr. Brandeis, if that is the case?"

Senator CHILTON. We will take a recess for about 10 minutes, to answer the call of the Senate.

(At 11.05 o'clock a. m. the committee took a recess, and at 11.10 o'clock a. m. the committee resumed its session.)

Mr. LIGGETT. Mr. Chairman, when the brief recess was taken I was explaining the reasons for these delays.

Senator WORKS. We want to get the facts as near as we can.

Mr. LIGGETT. Originally it was not intended that the bringing together of these two businesses should be a merger. Rather, the United Drug Co. was making an outright purchase of the stock of the Riker & Hegeman Co. In that proposal as originally put out by ourselves we met with some objection from a substantial minority of the Riker & Hegeman interests. It was the intention of our attorneys at that time to drive the sale through, however, and sell to a Massachusetts corporation. That we could not do, because the directors did not care to take a chance of selling the assets of their business in New York State because of the laws existing in New York State requiring a two weeks' notice of sale; and during that time our business would be, you might say, in the air, and at any time those minority interests who were objecting to the sale of the property might obtain injunctions, and we would be without a corporation. That forced us to go into New York State as a United Drug Co. and merge rather than buy the two businesses, and it was that process rather than anything else that occasioned all of those delays.

Senator WORKS. Now, you may go on. You were telling us what occurred between you and Mr. Snow and his determination to consult Mr. Brandeis. Had you concluded that?

Mr. LIGGETT. I had concluded that.

Senator WORKS. Was that all the connection you had with it?

Mr. LIGGETT. That was all the connection I had with it.

Senator WORKS. Did you come in contact with Mr. Brandeis after that?

Mr. LIGGETT. I have never seen Mr. Brandeis that I know of.

Senator WORKS. Did you ever see any paper in the form of an opinion or brief that was prepared by Mr. Brandeis?

Mr. LIGGETT. Yes, sir; a joint letter signed by Mr. Brandeis and Mr. SNOW.

Senator WORKS. Have you that letter now?

Mr. LIGGETT. No, sir.

Senator WORKS. Mr. SNOW, have you that letter?

Mr. FREDERICK E. SNOW. I have a carbon copy.

Senator WORKS. Will you let us have it in this connection?

Mr. GEORGE W. ANDERSON. I have the original here, Senator [handing document to Senator Works].

Senator WORKS. Will you pardon me until I look over it a little? I have no idea what it is. [After examination of document.] This seems to be a sort of a general history of all these corporations, is it not, Mr. SNOW? I do not want to take time to read it all.

Mr. SNOW. If you will ask me questions later, I can tell you just how that came to be prepared.

Senator WORKS. Yes; we will probably ask you questions, but I wanted to find out without reading all of this.

Mr. SNOW. It is a statement of the facts, with an opinion as to the law.

Senator BORAH. Does it contain your views as to the law also?

Mr. SNOW. Yes, sir.

Senator WORKS. That is what I was wanting to find out.

Mr. Liggett, at the time this opinion was furnished by Brandeis, what was the condition of this merger or consolidation, or whatever it might be called? Were all of these chains of stores, as we may call them, under your control at that time?

Mr. LIGGETT. No, sir.

Senator WORKS. This was before the merger took place—the final merger?

Mr. LIGGETT. Before the final merger took place. The final merger took place on February 4 of this year.

Senator WORKS. This is dated, I see, December 16, 1915.

Mr. LIGGETT. Yes, sir.

Senator WORKS. And the consolidation took place in February following?

Mr. LIGGETT. The final merger; yes, sir.

Senator WORKS. Did you have any conferences with Mr. Anderson after this opinion was furnished?

Mr. LIGGETT. I think so, Senator.

Senator WORKS. What was said at that time?

Mr. LIGGETT. Pardon me just a minute.

Senator WORKS. Oh, yes.

Mr. LIGGETT. I want to separate the first and second conferences.

Senator WORKS. Take your time.

Mr. LIGGETT. My impression is that on the second conference Mr. Anderson wanted to find out from me whether or not we were arbitrarily cutting off agents of our company for the purpose of doing more business with possibly another agent, and he examined me very closely as to our contracts with agents, the 7,000 agents representing us. I think the examination took a little further range than that, but that was the principal subject of the examination.

Senator WORKS. Were you able to satisfy his mind on that subject?

Mr. LIGGETT. From my viewpoint; yes, sir.



Senator WORKS. What did he say about it?

Mr. LIGGETT. In what way? Mr. Anderson was not persistent in any way regarding it. He was simply looking for information to make a record, and asked me questions about it to which I replied, giving him facts.

Senator WORKS. Did you have any communication with Mr. Anderson after that time indicating what his final conclusion was about it?

Mr. LIGGETT. I only know that from my counsel, Mr. Snow, who told me that Mr. Anderson had finally prepared a report which he had shown to Mr. Snow before sending it to Washington. That report was adverse to the United Drug Co., and in that report he had not found that the merger in itself was possibly in violation of the Sherman antitrust law, but that it gave us sufficient power which, if we abused it, might bring us within the law. That was my understanding of it.

Senator WORKS. Mr. Anderson, can you furnish us with the original of that report?

Mr. ANDERSON. I have a copy of it here, sir [handing document to Senator WORKS].

Senator WORKS. Mr. Chairman, in this connection I will ask leave to introduce this communication, signed by Mr. Brandeis and Mr. Snow.

Senator CHILTON. That will go in the record.

Senator WORKS. And also I introduce the report of Mr. Anderson to the Attorney General.

Senator CHILTON. Let the stenographer mark those for convenience, so that you may put them right in.

(The documents referred to were marked, in the order named, respectively, "Liggett Exhibit No. 1, with subexhibits A, B, C, D, and E," and "Liggett Exhibit No. 2," and are here printed in full, as follows:)

#### LIGGETT EXHIBIT No. 1.

(Stamped on margin:) Received and noted Dec. 17, 1915. G. W. A.

DECEMBER 16, 1915.

GEORGE W. ANDERSON, Esq.,

*U. S. Attorney for the District of Massachusetts.*

DEAR SIR: In the matter of the proposed acquisition by the United Drug Company of the Riker & Hegeman Company business, we deem it desirable to summarize the facts and principles of law applicable, which have from time to time formed the subject of discussion between yourself and Mr. Snow. We do this in the belief that upon a full consideration, you will conclude that the proposed purchase is lawful beyond any reasonable doubt.

#### FIRST. THE ORGANIZATION AND BUSINESS OF THE UNITED DRUG COMPANY.

Prior to 1902 Louis K. Liggett conceived the idea of organizing independent retail druggists into cooperative drug manufacturers. This idea was put into effect by the organization in New Jersey in 1902 of the United Drug Company. Of the original capital stock of this company \$160,000 was subscribed for by about forty druggists located in various parts of the United States. Mr. Liggett became, upon the organization of the company, its executive head, and has held the position ever since.

The principal place of business of the United Drug Company is Massachusetts. It has warehouses in Chicago, St. Louis, San Francisco, and Liverpool, and a branch factory in Toronto, Canada. In 1911 it was proposed, as herein-after stated, to reincorporate the business under the Massachusetts law, and

to dissolve the New Jersey company. Legal obstacles presented by those interested in the Riker & Hegeman Company, holding 120 out of 12,730 shares, prevented (see 80 Atlantic Reporter, 930), but the organization of the Massachusetts company for business was completed; and the Massachusetts corporation now carries on (mainly as a holding company through its subsidiaries) all the United Drug Company business.

The business consists of:

1. Manufacturing and wholesaling of drugs and other articles commonly sold in drug stores.
2. The conducting of retail drug stores.
3. The ownership of a minority of the capital stock in one retail drug store company.

The character and extent of the business now being conducted by the United Drug Company will appear from the following statement covering its operations during the year ending June 30, 1915:

I. MANUFACTURING AND WHOLESALING BUSINESS OF THE UNITED DRUG COMPANY  
(IN THE UNITED STATES).

(a) Drugs .....	\$1,797,000
(b) Patent and proprietary medicines .....	
(c) Cigars and cigarettes .....	1,558,000
(d) Candy .....	1,199,000
(e) Stationery .....	732,000
(f) Toilet articles .....	592,000
(g) Soda .....	525,000
(h) Rubber goods .....	454,000
(i) Spring water .....	38,000
(j) Miscellaneous supplies .....	719,000
	<hr/> 7,614,000

In addition to this \$7,614,000 gross business, about \$400,000 business was done with dealers in Great Britain and Canada. Of the \$7,614,000 done in the United States, \$685,000 was business done with the retail stores owned by the United Drug Company, through a subsidiary corporation called the Louis K. Liggett Company.

II. RETAILING BUSINESS OF THE UNITED DRUG COMPANY.

The retail business of the United Drug Company amounts to about \$5,000,000 a year and is conducted wholly through its subsidiary, the Louis K. Liggett Company, which was organized in 1909 for the purpose of operating retail drug stores in some of the larger cities. It now owns and operates in all 46 such stores in different cities in the United States and Canada, namely:

<b>Massachusetts:</b>		<b>New Jersey:</b>	
Boston .....	5	Paterson .....	1
Brockton .....	1	<b>Ohio:</b>	
Brookline .....	1	Columbus .....	2
Haverhill .....	2	<b>Michigan:</b>	
Lawrence .....	1	Detroit .....	3
Lowell .....	1		<hr/>
Salem .....	1	<b>Rhode Island:</b>	
Worcester .....	1	Newport .....	1
	<hr/> 13	Providence .....	5
	<hr/>	Pawtucket .....	1
			<hr/>
<b>New York:</b>			7
Binghamton .....	1		<hr/>
Buffalo .....	4	<b>Ontario:</b>	
New York City .....	4	Toronto .....	2
Syracuse .....	3	<b>Manitoba:</b>	
Troy .....	1	Winnipeg .....	5
	<hr/> 13		

## III. STOCK INTEREST OF UNITED DRUG COMPANY IN OTHER RETAIL STORES.

The only stockholding of the United Drug Company in retail stores other than the Liggett stores is a minority interest of \$114,000, par value, in the Owl Drug Company, which operates in all twenty-two stores in cities on the Pacific coast. The annual business of the Owl Drug Company is about \$5,000,000. The dividends received by the United Drug Company from it during the last year were \$7,200.

## IV. COMBINED STATEMENT OF THE WHOLESALE AND RETAIL PROPERTIES OF THE UNITED DRUG COMPANY.

The United Drug Company (of Massachusetts) has an outstanding capital stock of \$8,026,350. Its assets consist mainly of stock in its subsidiary companies, namely:

(1) All but 120 shares of the issued capital stock of the United Drug Company of New Jersey, par preferred, \$523,000; par common, \$754,000; which is the drug-manufacturing company.

(2) The entire capital stock of the Louis K. Liggett Company, par preferred, \$1,747,000; par common, \$3,125,000; which is a retailer conducting 46 retail drug stores.

(3) All the stock and bonds of the Cooperative Real Estate Company, which has an issued capital of \$163,700 in stock and has outstanding bonds of \$600,000 and owns the real estate and manufacturing plant in Boston, which is used by the manufacturing company.

(4) All of the common stock, par value, \$100,000 and \$81,000 preferred stock, being a minority of the preferred stock of the United Drug Company, Limited, which conducts the manufacturing and wholesale business in Canada.

(5) All the common stock of the par value of \$100,000 and the minority of the preferred stock, \$10,000, of the Guth Chocolate Company.

(6) The entire capital stock of the National Cigar Stands Co., \$200,000, common, and \$150,000 preferred, which is a jobber of cigars and cigarettes to its retail agents.

(7) The entire capital stock of the F. L. Daggett Company, \$100,000, which deals in soda-fountain supplies.

(8) The entire capital stock of the United Pharmaceutical Company.

(9) The entire common capital stock, \$25,000, of the Hanson-Jenks Company, which sells perfumes, and also the entire outstanding preferred stock, amounting to \$288,000, par value.

(10) The entire common capital stock of the Ballardvale Springs Company, which manufactures spring water, ginger ale, etc.

(11) An investment in a minority of the common and preferred stock of the Owl Drug Company, which is engaged in the retail drug business on the Pacific coast and has the exclusive selling agency in several cities for the United Drug Company.

The United Drug Company of New Jersey also owns—

(12) The entire capital stock of the United Perfume Company.

(13) The entire capital stock of the United Candy Company.

(14) The entire capital stock of the United Laboratories Company.

All of the above companies, with the exception of the Guth Chocolate Company, the F. L. Daggett Company, the Ballardvale Spring Company, and the Owl Drug Company, were organized at the instance of the United Drug Company for the purpose of carrying on various departments of the business.

The manufacturing business that has been referred to heretofore is conducted by one or another of these various companies whose stock is owned by the Massachusetts corporation. None of these subsidiary companies ever were competitive inter se, unless possibly the Guth Chocolate Company, manufacturing a relatively small part of the chocolate or candy product of the United States. The only retail business which is directly or indirectly owned or controlled by the United Drug Company is that of the Louis K. Liggett Company.

## SECOND. THE DRUG AND DRUG STORE BUSINESS OF THE UNITED STATES.

This business includes not only drugs and medical supplies, but many other articles now being sold commonly in drug stores, and which are generally sold in other general stores or in department or special stores.

## I. MANUFACTURING AND WHOLESALING.

(a) The manufacturing and wholesaling of drugs and kindred medicinal or surgical articles is carried on in the United States by several thousand separate concerns. Authentic information in regard to the extent and character of this business is not available. It was stated (how correctly we do not know) in May, 1913, by the Voice Salesman (a paper published in the interest of retail pharmacists) that this merchandise comes from the following manufacturing sources:

## Pharmaceuticals, etc.:

Parke, Davis & Co.-----	\$25, 000, 000	
Sharp & Dohme-----	5, 000, 000	
Eli Lilly & Co.-----	6, 000, 000	
John Wyeth & Sons-----	5, 000, 000	
About 40 or 50 others-----	120, 000, 000	
		\$161, 000, 000

## Advertised household preparations and patent medicines:

Cascarets-----	1, 000, 000	
Coca Cola-----	5, 000, 000	
Castoria-----	3, 500, 000	
Sal Hepatica-----	1, 500, 000	
Listerine-----	1, 000, 000	
Horlick's-----	4, 000, 000	
California Fig Syrup-----	1, 000, 000	
Doan's Kidney Pills-----	1, 250, 000	
Beecham's Pills-----	1, 500, 000	
Several hundred others, aggregating-----	180, 000, 000	
		199, 750, 000
		360, 750, 000

## Sale of sundries:

Geo. Borgfeldt & Co.-----	20, 000, 000	
Other sundry wholesalers-----	80, 000, 000	
		100, 000, 000

## Surgical dressings:

Johnson & Johnson-----	10, 000, 000	
Bauer & Black-----	2, 000, 000	
Seabury & Johnson-----	1, 500, 000	
		13, 500, 000

## Drugs and chemicals:

Malinckrodt-----	10, 000, 000	
Squibbs-----	2, 000, 000	
Merck & Co.-----	10, 000, 000	
Powers, Weightman & Rosengarten Co-----	15, 000, 000	
		37, 000, 000
		150, 500, 000
		511, 250, 000

(b) The manufacturing and wholesaling of other articles commonly sold in drug stores, like candy, soda-water supplies, rubber goods, stationery, and sundries, is conducted probably by several thousand separate manufacturing and wholesale concerns with sales aggregating many hundreds of millions of dollars.

It thus appears that the total manufacturing and wholesale business of the United Drug Company, including all classes of merchandise, is probably but a small fraction of one per cent of the total production in the United States of all kinds of merchandise commonly sold in retail drug stores. It is doubtful whether the sale of any one class of merchandise constitutes much more than one per cent of the total manufacture and sale of that class of merchandise in the United States.

If the comparison is limited to the total output of drugs and proprietary medicines, one per cent may be a reasonable estimate. This department of the business of the United Drug Company in the year ending June 30, 1915, amounted to \$1,797,000. According to the last available United States census figures, the total manufactures of this kind in the United States at cost in 1909 amounted to \$127,000,000. To this is to be added for comparison manufacturers and jobbers' profits, and also imports from foreign countries and increase since 1909.

The United Drug Company did not absorb, consolidate, or acquire in any manner any existing competitors. It created a new competitor in manufacturing and wholesaling.

In the wholesale drug trade there are other manufacturers or wholesale distributors who operate through retail distributing agencies, and under advertised special names and some with preference and price-restriction agreements, including, among others:

(1) The American Drug Syndicate is a manufacturing and wholesaling concern which distributes its products through retail members, most of whom are stockholders of the company. In the publication of this company for September 15, 1915, it is stated: "The A. D. S. now has over 22,000 members, about 4,000 of whom are nonstockholder associate retailers."

This company has been in existence about 10 years. No figures are at hand as to the amount of business which it does, but the secretary's report for the month ending September, 1915, states that the volume of business is steadily increasing, and that for the month of July, 1915, the increase amounted to almost \$2,500 a day over the business of July, 1914. According to the Voice-Salesman for May, 1915, at page 32, this syndicate claimed to be conducting a wholesale and jobbing business of \$5,000,000 a year. In May, 1913, this publication, page 65, stated that this syndicate had 17,000 members, and that 98 per cent of the stock was owned by retail druggists. This syndicate also claims to be able to supply 75 per cent of the druggists' wants. In 1911 it claimed to manufacture in its own laboratories 925 pharmaceutical products, household remedies, and toilet articles, and to buy for 13,000 retail druggist members 3,275 other items which all retail druggists sell. Its volume of business on this claim of \$5,000,000 is over 60 per cent as large as that of the United Drug Company. Its 22,000 members are more than three times as many as the members of the United Drug Company.

The secretary reports that its policy is to give its members "control of the A. D. S. line in their particular locality," but dependent on receiving "their active support," and that where a member "shows no activity" he will not be "permitted to exclusively occupy the territory where an active man's cooperation can be secured," and that "the A. D. S. line is certain to become a universal label at no very distant date."

(2) The "Druggists' Cooperative Association, Inc.," is manufacturing, advertising, pressing, and distributing "Valdona" remedies through "members."

(3) The Nyal Company is doing the same thing with "Nyal Remedies" through retailers under a terminable agency contract. Nyal Straight Talk for April, 1914, states that 13,000 druggists are pushing these remedies. This is about twice the number of the United Drug Company's agencies.

(4) Parke, Davis & Company, believed to be the largest and most widely known drug manufacturers in the United States, with a business in this country and abroad variously estimated at from five to thirteen times as large as the drug business of the United Drug Company, has established a printed form of contract whereby purchasers agree "to promote the sale of the preparations manufactured or sold by Parke, Davis & Company by giving them the preference upon all orders or prescriptions wherein similar preparations of competing houses are not specified, and by such other means as opportunity from time to time may afford."

## II. RETAIL DRUG STORES OF THE UNITED STATES.

You have estimated that there are about 50,000 drug stores in the United States, of which about 45,000 are licensed. It is not possible to determine with accuracy in what proportions the sales of these 50,000 drug stores are divided as between the drug business proper and other departments. The proportion varies with each store.

It may shed some light upon the volume of the relative classes of business in high-grade progressive stores to note that the sales in the Liggett store in the Grand Central Station, New York City, for the calendar year 1914 were divided substantially as follows:

Soda -----	\$88, 000	Rubber goods -----	\$21, 000
Candy -----	61, 000	Toilet articles -----	71, 000
Cigars and cigarettes -----	40, 000	Stationery -----	32, 000
Photographic -----	26, 000		
Drugs -----	34, 000	Total -----	429, 000
Patent medicines -----	56, 000		

This shows an approximate percentage of drugs, 8 per cent, and of patent medicines, 13 per cent.

Mr. Liggett estimates the gross business done by these 50,000 drug stores in all kinds of merchandise at \$500,000,000 annually. We understand that you have received estimates showing that the aggregate was from \$750,000,000 to \$1,000,000,000, and from the data furnished by the Voice-Salesman as to sales of drugs and medical supplies, the estimates suggested by you seem conservative.

The retail drug store business conducted by the United Drug Company through its Liggett stores now amounts probably to not more than one-half of 1 per cent of the total business done by the retail drug stores of the country.

In many communities, by reason of their drug licenses, drug stores are kept open from early morning until late at night, as well as on Sundays and holidays. You have estimated that the number of merchandising hours a week that now obtain in these store is probably double that enjoyed by the department stores in large cities. This affords special opportunity for sale of general merchandise.

The number of stores in the United States other than drug stores which sell some or all of such classes of nonmedical merchandise as are distributed also through drug stores must be several hundred thousand, and their sales, in the aggregate, probably billions of dollars. The Liggett stores, therefore, do only a small fraction of this nonmedical goods merchandising, or of the retail distribution of any class of such nonmedical merchandise.

### THIRD. THE RIKER & HEGEMAN COMPANY.

The Riker & Hegeman Company is a New York corporation, with an issued capital stock of \$2,145,000 preferred and \$8,469,620 common. Its business is the operation of retail stores, but it does also a small manufacturing business.

#### 1. RETAIL STORES.

It operates in all, directly and through subsidiaries, 117 retail drug stores in forty-seven different cities, namely:

1. Retail stores (81) owned directly by the Riker & Hegeman Company are as follows:

Connecticut:		New York:	
Bridgeport	1	Brooklyn	7
Hartford	1	Mount Vernon	1
New Britain	1	New Rochelle	1
New Haven	2	New York	41
Stamford	1	Rochester	2
Waterbury	1	Schenectady	1
		Troy	1
	7	Utica	1
		White Plains	1
District of Columbia:		Yonkers	1
Washington	1		
			57
Delaware:			
Wilmington	1	Pennsylvania:	
		Germantown	1
New Jersey:		Lancaster	1
Jersey City	1	Liberty	1
Newark	2	Philadelphia	4
Paterson	2	Pittsburgh	1
Trenton	1	Wilkes-Barre	1
	6		9

2. Retail stores (35) owned by its subsidiaries, the Jaynes Drug Company are as follows:

Massachusetts:		Massachusetts—Continued.	
Boston	13	Haverhill	2
Brockton	1	Holyoke	2
Cambridge	1	Lawrence	1
Chelsea	1	Lowell	1
Fitchburg	1	Lyons	1

Massachusetts—Continued.		Maine:	
New Bedford.....	1	Bangor.....	1
Pittsfield.....	1	Lewiston.....	1
Salem.....	1	Portland.....	1
Springfield.....	3		
Worcester.....	1		
	<u>31</u>		<u>3</u>
		Rhode Island:	
		Providence.....	1

3. Retail store (1) in New York City is owned by its subsidiary the William B. Riker & Sons Company.

The aggregate business of these 117 drug stores is about \$15,000,000.

It thus appears that the Riker & Hegeman Company does in its retail stores from 1½ to 3 per cent of the total retail drug-store business of the United States.

If the United Drug Company acquires the Riker & Hegeman Company business, the two together would do from 2 to 4 per cent of the total retail drug-store business of the United States, and own 163 out of 50,000 retail drug stores.

The acquisition by the United Drug Company of the Riker & Hegeman stores would not give to the United Drug Company any large percentage of the drug stores in the cities in which Liggett stores have been established. The number of Liggett and Riker & Hegeman stores and of all drug stores in the chief cities are as follows:

	Liggett stores.	Riker & Hegeman stores.	Other drug stores.
New York City.....	4	41	2,402
Boston (proper).....	5	13	354

A few only of the Liggett stores are in competition with the Riker & Hegeman stores. The competitive area of these retail stores is frequently limited to a small part of the city in which they are located. The customers are largely the casual customers passing the particular store.

As a test of the competitive area of a retail drug store it is worthy of note that the Riker-Jaynes Company has established more than one store on the same street within two or three city blocks, and in some cases has established more than one store on different streets on the same block.

Not only will the elimination of competition between the retail stores be imperceptible, but also it will not come within the purview of the Sherman Anti-trust Act because it is wholly local and intrastate.

There are other drug companies having a number of different stores, such as the May Drug Company, of Pittsburgh, with some ten or twelve; Dow, of Cincinnati, about twelve; Taylor, of Louisville, six; the Owl Drug Company, in which, as has already been pointed out, the United Drug Company owns the minority stock, twenty-two; Schultz, of Denver, eleven or twelve; Riner, of Providence, five; and Marshall Drug Company, of Cleveland, thirteen stores.

## II. MANUFACTURING.

The Riker & Hegeman Company also, through its subsidiaries, the Hegeman Drug Company, Riker Laboratories (Inc.), Arly (Inc.), and V. Vivaudou (Inc.), manufactures the following articles sold in drug stores, namely: Toilet articles, consisting largely of perfumes, cold creams, face powders, lotions, dentifrices, proprietary articles under the names of "Riker" and "Jaynes," such as cough sirups, cold cures, tonics, etc.

They package in their factory articles such as alum, borax, and other numerous drug items that are sold at the counters under the common names of the articles.

They also manufacture tinctures and fluid extracts, that are sold over the prescription counters under the common names of the articles.

They manufacture for outside sale in the name only of the Vivaudou and Arly companies, which are subsidiaries of the Riker Co., perfumes and toilet articles

as above described, but no proprietary articles or any of the other after-mentioned items in the above list.

The aggregate manufacturing business of the Riker & Hegeman Company is about \$1,200,000. Of this all but about \$385,000 is sold to the Riker & Hegeman Company's retail stores. This \$1,200,000, of course, is only a negligible fraction of 1 per cent of the total production of the United States even of these specific classes of merchandise.

The competition between the Riker & Hegeman Company and the United Drug Company as wholesalers is very limited. The sales of the United Drug Company are, with trifling exceptions, to its own 7,000 agencies in the United States and foreign countries, and there are 50,000 retail druggists in the United States and many in other countries. Of the \$385,000 sales by the Riker & Hegeman Company, only that part which goes to the 7,000 Rexall stores comes into competition with the United Drug Company in wholesaling. Even this part is not wholly competitive, because a considerable part of their goods is carried by the retailer to supply customers seeking articles sold under trade names.

#### FOURTH. THE UNITED DRUG COMPANY'S PLAN OF CONDUCTING BUSINESS.

The doubts expressed by you as to the legality of the United Drug Company have been directed not so much to the proposed acquisition of the Riker & Hegeman business as to the general plan upon which the United Drug Company was organized and is being operated. The plan is this:

The Drug Company selects in the various cities and towns, usually one of the existing drug stores, to become a stockholder to be known as the Rexall store, and to become a so-called territorial exclusive agent—that is, the United Drug Company sells its products described as Rexall goods to this store only. In a few cities there is more than one such Rexall store, the additional stores being ordinarily treated as subagencies. By the terms of the contract hereinafter described between the United Drug Company and a Rexall store, the latter must acquire and hold stock in the United Drug Company, and must also bind itself to give preference to these goods in display, and in promoting their sale to customers. The Rexall stores have, however, full liberty to purchase and to sell any and all other competing and noncompeting goods.

It is believed that about half of these stores are also members of one or more of the above-described wholesale organizations, such as the American Drug Syndicate, and that substantially all of them are purchasers of the goods of Parke, Davis & Company. Some of these undoubtedly regard these connections as equally valuable to those of the United Drug Company.

Of these stores about 6,000 are in the United States and 1,000 in other countries. The business in the aggregate of these 7,000 stores is estimated at from \$100,000,000 to \$150,000,000 a year. The purchases of these 7,000 stores from the United Drug Company is estimated at about \$7,000,000, or 5 per cent of their total sales.

The United Drug Company has, in developing its business, gradually increased the number of Rexall stores in the United States, the growth from year to year being shown in the following schedule:

Year.	Agencies.	Year.	Agencies.
1902-----	0	1909-----	2, 218
1903-----	279	1910-----	2, 755
1904-----	767	1911-----	3, 628
1905-----	833	1912-----	4, 534
1906-----	1, 081	1913-----	5, 056
1907-----	1, 360	1914-----	5, 570
1908-----	1, 762	1915-----	5, 877

#### PRESENT FORM OF CONTRACT.

The contract with the Rexall stores now in use, being the form adopted July 22, 1914 (which varies in some respects from forms previously used, of which a few, although recalled, have not been returned for cancellation), provides in substance as follows:

1. It gives the retailer the exclusive right in the named territory to handle Rexall remedies and other products of the United Drug Company.



2. It requires the retailer to keep a stock of the Rexall remedies on hand, and to give the United Drug Company products "first preference in display, advertising, and sale."

3. It allows the United Drug Company to terminate the agency whenever the retailer "shall fail to exercise the selling privileges in a manner satisfactory to said company."

4. It prohibits, without the written assent of the United Drug Company, the attempt to sell or transfer any of the selling rights therein granted, but it provides that if the United Drug Company determines to exercise its option to terminate the contract "the retailer may contest such termination before the arbitration committee of the company, as provided in its by-laws, it being agreed that the decision of the arbitration committee, or any majority thereof, shall be final and binding upon each of the parties."

5. It provides that "it is expressly understood and agreed that the trade-mark 'Rexall' is the exclusive property of the company, used in connection with the sale of its goods, and the retailer, upon the termination of this agreement in whatever manner and for whatever cause, will at once discontinue and abandon the use of such trade-mark 'Rexall' and all other trade-marks and designations of the company, and will immediately cease to advertise or represent or designate his store as 'the Rexall store,' and will remove permanently all Rexall signs in or about his place of business; and in the event of any failure of the retailer to remove such Rexall and other signs the company may enter the premises of the retailer and itself remove such signs."

In article three, section 10, of the by-laws, is a provision for the annual election of seven stockholders, none of whom are directors or officers of the corporation; also seven alternates to act as an arbitration committee. This arbitration committee is to have "the power to pass upon and determine all matters of difference between this corporation and any of its stockholders with respect to termination by the corporation of the right of any stockholder to sell the goods and products manufactured and sold by this corporation in accordance with the terms of any contract which may at the time exist between this corporation and such stockholder."

#### EARLIER FORMS OF CONTRACT.

Although not of consequence in the present discussion, it may be noted that prior to the adoption on July 22, 1914, of the form of contract now in use five different forms of agreements had been in use successively.

The first form described the United Drug Company as the manufacturer and the stockholder druggist as the retailer. It set forth that the manufacturer is engaged in the business of making the "Rexall remedies and other products"; that the retailer has purchased a portion of the manufacturer's capital stock and desires to be appointed a special selling agent of the manufacturer in a stated place; and that the manufacturer appoints the retailer its special agent in this place and agrees not to sell its products to any other dealer in this place so long as the retailer "shall perform the terms of this agreement." The retailer agrees to "uphold all the products of the manufacturer \* \* \* to the full list price set by the manufacturer," and "further agrees never under any circumstance to sell or allow said products to be sold to the wholesale or retail dealers, except at the full retail price." The retailer "further agrees to confine the sale of the products" of the manufacturer "to his own retail store and to consumers only," and for each violation to pay the manufacturer \$100 as liquidated damages. The agreement is to remain in force as long as the retailer continues to hold stock in the manufacturer. It is agreed that if the retailer owns preferred stock in the manufacturer, that if it is mutually agreeable, the manufacturer will waive the three-year redemption clause inserted in the stockholder's certificate "so long as the territory controlled by" the retailer "shall prove profitable" to the manufacturer. The manufacturer agrees to keep a record of advertising charged directly to the territory of the retailer and to credit this record with all purchases. It is agreed that the retailer, in case he desires to sell his stock in the manufacturer, will first offer it to the executive committee of the manufacturer.

The next form of contract prevailed for an unascertainable time. It varied chiefly from the foregoing in containing the provision that if the retailer is dissatisfied with the agency or feels that any misrepresentation has been made by the United, he may notify the United and the United shall take his

stock at par plus 7 per cent interest less dividends received, and the manufacturer also will take back merchandise sold the retailer, at cost. The provisions for maintaining full retail prices and selling only in the retailer's store and to consumers still continued.

The next form of contract covered a period from about 1907 to about 1910. It contained these provisions:

The retailer agrees (1) to use his best efforts to extend and increase the sale of Rexall remedies and other products manufactured solely by the United in his territory, to keep stock on hand, bringing same to the attention of customers, always to sell them when called for, and not to sell except to consumers in his own store, and not to sell below the full list price set by the manufacturer; (2) to carry no stock or remedies similar to the Rexall remedies and other products manufactured and sold by the manufacturer and sold in competition to the goods of the manufacturer without giving goods of the manufacturer preference in display and sale; (3) there are provisions relative to any sale of stock except in accordance with the by-laws. This form provided that "it is mutually agreed that the agreement may be terminated by the retailer on thirty days' notice, and shall terminate at once and without notice upon any violation by either party, and shall be terminated at the option of the United whenever the retailer shall fail to execute the agency hereby granted in a manner satisfactory and profitable to said party of the first part."

This form contained further provisions relative to the repurchase by the manufacturer of any Rexall goods or other stock acquired from the manufacturer, provided they were in good condition at the termination of the contract.

The next form of contract adopted and issued at some time between 1910 and 1914 contains no express provision for the maintenance of resale prices and is in other respects substantially like the preceding form.

The next form, adopted July 22, 1914, has already been described.

#### ARTICLES DEALT IN.

There is not a single article manufactured by the United Drug Company which is in any sense a monopoly; that is, every article manufactured by the United Drug Company is a competitive article. In fact, in every well-equipped Rexall store many such competitive articles are necessarily kept and sold to such purchasers as call for them. Even in the Liggett stores, which are owned by the United Drug Company, these competing articles are sold in large volume. This is well illustrated by the inventory of the Liggett store on School Street, in Boston, on April 6, 1915.

Of the medical preparations sold by the United Drug Company, three are "pushed" perhaps more than any of the others, namely, Rexall Orderlies—a laxative; Rexall "93" Hair Tonic; and Rexall Dyspepsia Tablets. The manager of each Liggett store is given full discretion in the purchase of merchandise, limited only by the general direction not to buy anything not reasonably required for the trade. On April 6, 1915, this Boston store had in stock of these classes of articles, goods at cost, as follows:

Rexall Orderlies and other laxatives, 7 in number, manufactured by the United Drug Co.; cost-----	\$15.57	Competitive laxatives, 265 in number, manufactured and sold by more than 160 other competing concerns; cost--	\$269.95
		(See Schedule A hereto attached.)	
Rexall Hair Tonic and other hair tonics, 3 in number, manufactured by the United Drug Co.; cost-----	14.07	Competitive hair tonics, 69 in number, manufactured and sold by more than 64 other competing concerns; cost--	99.28
		(See Schedule B hereto attached.)	
Rexall Dyspepsia Tablets and other dyspepsia remedies, 13 in number, manufactured by the United Drug Co.; cost--	20.04	Competitive dyspepsia remedies, 117 in number, manufactured and sold by more than 53 other competing concerns; cost-----	121.88
		(See Schedule C hereto annexed.)	

Another indication of the lack of control which the United Drug Company has over wholesale distribution is the division of wholesale purchases between this

company and others in its own Liggett stores. In the third quarter of 1915 it is estimated that the Liggett store in the Grand Cenral Station in New York purchased from:

	United Drug Co.		Others.	
	Amount.	Per cent.	Amount.	Per cent.
Drugs.....	\$3, 139	17	\$15, 366	83
Candy.....	2, 671	21	9, 866	79
Perfume.....	981	6	15, 472	94
Stationery.....	684	15½	3, 542	84½
Rubber goods.....	878	19	3, 783	81
Cigars.....	7, 005	82	1, 520	18
Fountain supplies.....	1, 791	12	12, 754	88

<sup>1</sup> Note that the United Drug Company manufactures no cigars and acts as to them as a jobber, so that 100 per cent of these come from outside manufacturing sources.

(In the above statement the purchases from the United Drug Company are taken from the actual figures on the books. Owing to a change in the classification of accounts as kept by the Liggett Company it is not possible to get the different outside purchases specified according to single departments for the year 1915, but this estimate is based upon the actual purchases in 1914 for the same period, with an addition of 15 per cent, which represents the general increase in business.)

The total sales of the United Drug Company to all the Liggett stores (\$685,000) is about 13½ per cent of the total sales by those stores, or about 20 per cent of the purchases. As the purchases of their own stores are thus limited, notwithstanding the natural incentive to purchase from themselves, it is evident how small a percentage is purchased from the United Drug Company by the other agency stores, not having as great an incentive. It is estimated to be under five per cent on the average.

#### THE REXALL TRADE-MARK.

"Rexall" is a trade-mark owned by the United Drug Company. It does not mean a particular remedy. It signifies goods selected and manufactured by the United Drug Company, and therefore presumably having the qualities to be expected from such a source. It really means "goods prepared or approved by the United Drug Company." A Rexall store is a store which sells such goods, and which also presumably in its conduct is approved by the United Drug Company, as it has given it the so-called territorial agency. Irrespective of any provisions in the contract, the term "Rexall" obviously could not be used honestly by any one except upon such goods as are obtained from the United Drug Company and could not be used by any store except one which the United Drug Company selected as its so-called agent. The United Drug Company has taken care in the manufacture and selection of its goods. It has advertised them widely and the demand for them is created by the care and enterprise of the concern. To persons convinced by these means, the name "Rexall" carries weight, as does the name of certain other well-known manufacturers, such as Parke, Davis & Co., John Wyeth & Sons, and many others.

The requiring from a so-called exclusive agent a preference in the display and urging of the manufacturer's goods is a much more mild requirement than those long exacted in the settled practices prevailing in ordinary business. It is a normal and usual method to further trade. There is nothing about it indicative of a purpose or likely to produce an effect injurious to the public interest.

There appears to be nothing in the contract which can result in restraining trade, for the drug store has full liberty to sell the goods of others and is under no contract to maintain prices.

There has never been in the conduct of the United Drug Company's business even a suggestion of any attempt at coercion, or destructive business, or of unfair practices. The grievance or arbitration committee was established in 1912. It has been called to act on eight cases only. In each of these cases the difficulty was the small amount of the sales as compared with the opportunities of the particular agencies. No agency has been threatened with termination

for price cutting or for failure to prefer Rexall goods or for buying from other manufacturers. A memorandum covering all these cases is hereto annexed marked "D."

In addition to these cases considered by the arbitration committee, there are eleven pending cases in which the company is dissatisfied with the conduct of the agency. In ten of these the objection relates solely to the amount of goods purchased or the payment therefor. In one case the objection is misrepresentations claimed by the agent. A schedule of these eleven cases is hereto annexed, marked "E."

The position which the United Drug Company has taken toward its stockholder agents is substantially this:

"We expect you to push the sale of Rexall goods, so far as you reasonably may, in view of the opportunities in your particular locality, and to prefer them where practical, and beyond this you are at liberty to buy, sell, and push the sale of the goods of our competitors to any extent that you see fit."

#### FIFTH. THE PRESENT INTENTIONS OF THE UNITED DRUG COMPANY FOR THE FUTURE.

This company intends to increase its business by pursuing the methods now in use. It is Mr. Liggett's ambition to be able to manufacture or otherwise supply every kind of article which is sold in a drug store. This, of course, does not mean that there is any possibility of manufacturing or supplying all of the necessary different brands of each kind of article. Many of these brands are manufactured exclusively by other concerns, and must be carried by any well-equipped retail drug store because of the need of supplying them to customers desiring them. Mr. Liggett believes that one of the next additions to the articles manufactured and dealt in by the United Drug Company should be soda-fountain supplies, because of the present impossibility of getting such supplies in the market of a satisfactory character. The company has no specific enlargement in view, except the consolidation with the Riker & Hegeman Company.

The reasons prompting both concerns to this consolidation are that those owning the larger interests in the Riker & Hegeman Company desired to be relieved from active participation in the drug business and to take advantage of the successful management of the United Drug Company and of the Liggett Company, so as to insure economy in the future, and the United Drug Company believes that enlarging the number of retail stores which it owns will result in a large increase in the volume of its sales and will greatly reduce the proportionate overhead and other expense, and that the amount of merchandise which it is necessary to keep on hand will, in proportion to the sales, be reduced.

There is a further reason for the consolidation in that W. B. Riker & Sons Company and the Jaynes Drug Company now have pending in New Jersey a suit against the United Drug Company originally brought to establish an exclusive agency for the sale of Rexall goods, both in New York and Boston, and the consolidation will result in the dismissal of this suit and the subsequent elimination of any obstacle to the dissolution of the United Drug Company of New Jersey.

The proposed consolidation takes the form of a purchase of the property and assets of both the United Drug Company and Riker & Hegeman Company by a new corporation, to be organized under the laws of Massachusetts or New York, with an authorized capitalization as follows:

First preferred, 7 per cent, cumulative dividends	\$7, 500, 000
Second preferred, 6 per cent, noncumulative dividends	10, 000, 000
Common	35, 000, 000

Total capital stock	52, 500, 000
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This stock to be distributed as follows:

First preferred stock of new company to United Drug Company preferred-stock holders	\$2, 938, 950
To Riker & Hegeman Company preferred-stock holders	2, 147, 400

Total 7 per cent cumulative preferred stock, presently issuable	5, 086, 350
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Second preferred stock of new company to United Drug Company common-stock holders .....	\$5, 250, 000
To Riker & Hegeman common-stock holders .....	3, 859, 000
Total 6 per cent noncumulative second preferred stock, presently issuable .....	9, 109, 000
Common stock of new corporation to United Drug Company common-stock holders .....	11, 250, 000
To Riker & Hegeman Company common-stock holders .....	8, 800, 000
Total common stock, presently issuable .....	20, 050, 000

By this plan the present preferred-stock holders of the United Drug Company are to receive par for par of first preferred stock, and the common-stock holders are to receive \$225 in common stock and \$100 in noncumulative second preferred stock, or \$325, for each \$100 of common stock.

The Riker & Hegeman preferred-stock holders are to receive par for par of first preferred stock, and the common-stock holders are to receive \$100 of common stock and approximately \$44 of noncumulative second preferred stock for each \$100 of common stock.

This proposed consolidation will increase the gross capitalization of the two companies from \$18,500,000 to about \$34,250,000.

It should be noted that if, despite the valuable good will, this new capitalization should prove to be inflated, the public is not injured, because the prices which the new company can obtain are fixed by the extensive competition which exists. Any attempt to get unreasonable profit will inevitably swell the business of competitors, many of them already larger in their several lines than the United Drug Company.

Mr. Liggett has expressed the hope that the business can be increased to \$35,000,000. This is considerably more than is now in sight.

#### SIXTH. THE LEGALITY OF THE PLAN OF THE UNITED DRUG COMPANY.

The suggestion which you have made as to a possible illegality in the United Drug Company's plan of operation appears to rest practically upon the following propositions:

1. That with the growing success of its business, it has established in a large part of the country a high reputation for Rexall goods, which goods it sells through stores or exclusive agencies in about 6,000 cities or towns in the United States.

2. That it may, under the conditions set forth in its contract, terminate any one of those agencies, and that such termination might be a hardship to the agent.

3. That its right to terminate an agency might under the circumstances be used as a means of preventing the cutting of such prices at retail for the United Drug Company's goods as to it may seem proper.

4. That the possibility of termination of the agency induces among the agents a preference for the company's goods which puts its competitors at a disadvantage in seeking the same trade.

These suggestions we will now take up in their order:

- I. IT IS LAWFUL FOR THE COMPANY TO DEVELOP A WIDE DEMAND FOR ITS GOODS AND TO SELL THEM UNDER A TRADE-MARK AND THROUGH EXCLUSIVE AGENCIES.

The development of competition as the antithesis of restraint of it demands strong competitors. There is no restraint of trade in mere size and success. Certainly this is true up to the point of danger of monopoly. It is not necessary to consider in the present case beyond that point.

A sharp distinction exists between the creation of a new competitive unit and the unification of two or more existing competitors. When two or more are combined, there may be under some circumstances such an elimination of competition as to amount to a restraint of trade. There is nothing of this kind in the proposed combination. The growth of an original competitor to the point of acquiring, howsoever large, a part of the trade formerly going to his competitors does not of itself restrain trade.

The United Drug Company created its own business. It purchased no competitive business except the Guth Chocolate Company, above mentioned. It did not acquire the manufacturing or selling facilities or good will of any other manufacturer or wholesaler in competition.

The demand for the company's goods and their deserved reputation for quality were developed by the care, energy, and skill of the company, and not by any restraints of competition. Its goods were all competitive and were put out in competition with manufacturers, many of them stronger and much larger than itself.

The "Rexall" name does not affect the legal situation. The exclusive right to use a lawfully acquired trade-mark is no more a monopoly than is the right of an individual to use his own name. (*Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed., 566; affirmed *C. C. A.*, Second Circuit, Nov. 10, 1915.)

It is a convenient and effective form of describing the goods of a particular manufacturer.

None of the goods described by the term "Rexall" were of kinds of which the company had a monopoly. The only thing which distinguishes these goods is the selection and quality given them by the United Drug Company and the belief therein of the purchasers.

The vending of goods through exclusive agencies is lawful. It conforms to the Supreme Court's definition of methods not in restraint of trade (*Standard Oil Co. v. U. S.*, 221, U. S., 1, 67; *U. S. v. American Tobacco Co.*, 221 U. S., 106, 179-182), namely:

"Normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise to accomplish such purpose," and "Contract essential to individual freedom and the right to make which were necessary in order that the course of trade might be free."

One of the commonest courses pursued in business by those having no intention whatever to stop the competition of others has been the employment of exclusive distributing agencies. The most natural way for a manufacturer to promote the sale of his goods in a given locality is by assuring the retailer that the retailer's efforts to promote the reputation of those goods will redound to the advantage of the retailer in subsequent sales of the goods of the particular manufacturer.

This method of promoting sales is open to all manufacturers. (*Locker v. American Tobacco Co.*, 218 Fed., 447; *C. C. A.*, Second Circuit, November, 1914, dictum.) It tends to stimulate rather than to prevent competition. It results in no reduction of the sales of other manufacturers, except as any sale by one takes the place of the sale by another. This method is practiced, as noted above, by substantial competitors.

## II. AN EXCLUSIVE AGENCY MAY BE MADE TERMINABLE AT WILL OR FOR FAILURE TO PROMOTE THE SALES OF THE AGENCY.

The right to make a selling agency terminable at the will of a manufacturer has long been recognized. It is one of the normal methods of trade. It is frequently essential to getting efficient service in the agency.

The purpose of the creation of such an agency is to promote sales. If the sales are not promoted as extensively as another agency in the same community could promote them, the normal course is to terminate the first agency and create another in its place.

The express reservation of the right to terminate the agency, even without cause, is not unusual and in no sense restrains commerce. On the contrary, it promotes competition by energizing the agency of one of the competitors against all of the others.

Any fear which may be aroused in the agent that he may lose his agency if he fails to promote the sales of the particular manufacturer, is not coercive. It is only an invitation to effort by assurance of reward. The agent accepts the agency because he hopes to do more business by specializing upon the goods of the particular manufacturer, and the manufacturer foregoes the privilege of selling to other agencies because he believes that he can sell more goods by giving this incentive to the particular agent. The purpose of both in the arrangement is immediately and directly to increase sales of these goods in competition with all others.

The terminability of the agency makes only toward accomplishing this result.

The severity of such a termination is not so great but that 88 per cent of the retail druggists in the United States are doing business without a Rexall agency.

III. ANY PURPOSE THAT THERE MAY HAVE BEEN TO DISCOURAGE PRICE CUTTING  
 (1) IS AN INDEPENDENT AND NONESSENTIAL FEATURE WHICH COULD BE ABANDONED IF UNLAWFUL, AND (2) IS NOT BEING PURSUED UNLAWFULLY.

(1) All the anti price-cutting features, if any, of the agency contracts could be abandoned without affecting the essential features of the plan under which the United Drug Company operates. The essential features are efficiency and economy in manufacture, carefulness of selection, developing and maintaining quality and the reputation therefor, cooperation of retailers as virtual partners in manufacture, and concentration of selling effort upon the company's products by the retailers, induced by the belief that increasing the demand for the manufacturer's products will increase the sales of the retailer.

If any effort to prevent the destruction of prices were prohibited, these essential elements would remain.

None of these elements would be unlawful merely because the same concern also practiced unlawful price maintenance.

The fact that a company has made unduly restrictive arrangements as to prices is not a ground for preventing the further conducting of lawful business by the corporation which has engaged in such practices. (*U. S. v. U. S. Steel Corporation*, 223 Fed., 55 (D. C. D. N. J.), June 15, 1915.)

(2) The United Drug Company is not unlawfully maintaining prices.

The company no longer requires any agreement as to prices. The earlier contract which did require price maintenance was made at a time when there was a prevalent belief that the producer of a particular article had a legal right to protect against the resale of it at an unduly low price. That this belief was not without some foundation is shown by the fact that the decision to the contrary was by a divided court. As soon as it was decided in *Dr. Miles Medical Co. v. J. B. Park & Sons Co.* (220 U. S., 373) that an agreement so to protect the resale price was unlawful, the United Drug Company ceased to require this agreement. This in itself is evidence of an intention to conduct its business in a lawful manner.

It still issues a catalogue of its goods with a suggested price for each article. Such a suggestion from a manufacturer to a purchaser is obviously not in itself unlawful. It is entirely proper for the experienced manufacturer, sensible of many of those elements of the cost of selling goods at retail which are ignored by the less prudent retailers, to give to the retailer the benefit of his experience by indicating the prices at which such goods may be handled profitably. Certainly this is true where the goods are those which are in competition with other goods of the same kind. The price suggested by the manufacturer is inevitably affected by the prices fixed by others upon competitive articles. The free play of healthy competition is still protecting the purchasing public from an excessive price. The United Drug Company can not survive long if it urges prices above those on the competitive articles fixed by competitors.

If the suggested price be regarded as practically mandatory because of the power of the manufacturer to shut off the supply of goods, this does not render the suggestion unlawful. All that was decided or intimated in the case cited was that restraints upon alienation were contrary to public policy—that is, that public policy required that the holder of the full title to a chattel should not be under a binding legal obligation preventing its sale at such price as he chose to put upon it.

The court did not intimate that the object of a manufacturer to keep his product free from injurious consequences coming from its being known as a cut-rate article was an unlawful object. The court held merely that the manufacturer could not accomplish that object by means of a legal restraint upon the future alienation of property no longer belonging to the manufacturer. That particular means has been interdicted, but the object is not unlawful.

The only means which the United Drug Company, under its present contract, can apply to accomplish this object is the refusal to deliver more goods.

This means is open to any manufacturer—certainly, where he has not acquired a monopoly and is not dealing in a prime necessary of life. (*Great Atlantic & Pacific Co. v. Cream of Wheat Co.*, 224 Fed., 566; affirmed C. C. A., Second Circuit, November 10, 1915. *Union Pacific Coal Co. v. United States*, 173 Fed., 737, 739; C. C. A., Eighth Circuit, November, 1909, dictum. *Locker v. American Tobacco Co.*, 218 Fed., 447; C. C. A., Second Circuit, November, 1914, dictum.)

The refusal of the manufacturer to sell his goods is not of itself coercion. The retailer measures the value of these goods to him against the value of competing goods and makes his choice. The greater the actual value to him of the goods of the particular manufacturer, the greater the probability of his selecting those goods.

#### IV. THE PREFERENCE FOR THE COMPANY'S GOODS IS CREATED LEGITIMATELY.

All manufacturers of competing articles are put to a disadvantage in the competition by the good reputation acquired by the goods of other competitors, but the disadvantage does not indicate any illegality in the action of other competitors, and the advantage which the competitors get is a stimulant to healthy trading and the necessary reward of energy and care.

The preference for the United Drug Company's goods is not created by any unlawful means. It is produced by the good quality of the goods manufactured and the careful selection of them and the belief of the purchasing public therein, and the consequent demand therefor.

The requirement that the distributing retailer shall give preference in the display and sale of these goods is no more than would inevitably be required by the manufacturer who was giving an exclusive agency. Even if there were no such agreement, the manufacturer would naturally terminate the agency if such preference were not given.

The agent appointed becomes a stockholder and virtual partner in the manufacturing enterprise, and to that extent naturally interested in pressing the sale of the goods. He is selected ordinarily from a number of his competitors to give the same effort to furthering the business that any one of his competitors would naturally give if selected in his stead.

The agreement for preference is far less stringent than the implied agreement of a partner or of an agent to further the interests of the partnership or employer. It is a "normal and usual method" of trade conforming to long settled practices.

The failure to carry out the agreement entails upon the agent no undesirable consequences, except the cessation of the agency and of the right of the agent to remain a member of the manufacturing concern. These are positions which obviously he should not enjoy if he is not seeking to further the interests of that concern.

Much more astringent agreements have been held to be lawful. In *Mogul Steamship Co. v. McGregor* (1892, A. C., 25) it was recognized that a competitor in the effort to get trade might decline to deal with customers who dealt with his competitors or might give a better price to those customers who did not deal with his competitors. This case seems to have had the approval of the Supreme Court in the opinion in *Standard Oil Co. v. United States* (221 U. S., 1, 56). The Clayton Act has changed the law in certain respects, but it is apparent that there is nothing prohibited by that act which is being done in the present case.

The requirement that an agent give preference in attempting sale to the goods of the particular manufacturer is incomparably less restrictive than the requirement that the customer should not buy of any other competitor, except at the penalty of an enhanced price on the goods of the particular manufacturer.

The agent is free to determine whether the enjoyment of the exclusive agency is worth the burden of carrying out the natural obligation of the agency by preferentially urging the sale of the goods of the manufacturer. Eighty-eight per cent of the retail druggists in the United States do business without this agency.

Other manufacturers, in seeking the trade of the agent, encounter no obstacle except that the agent thinks that the goods of the United Drug Company will on the whole sell better, and the only reason for his thinking so is the selection and quality of the goods and the belief of the public therein. Some retailers apparently think otherwise and specialize the goods of other manufacturers.

Each competing manufacturer may, on equal terms, build up such a compelling reputation for his goods, and many of them have done so.

It is not the contractual preference, but it is the preference of the purchasing public for the goods of the United Drug Company which gives that company its influence.

To condemn the essential features of the plan of the United Drug Company, it would be necessary to say that retailers in large numbers could not combine



to manufacture for themselves under an arrangement that the goods manufactured should be sold through exclusive territorial distributing agents satisfactory to the manufacturers, and this notwithstanding the fact that the goods manufactured are a very small fraction of all the manufactures of the same kind in the United States, and that the retailers are a small fraction of all the retailers in the United States and in their respective districts, and are at liberty to purchase and to sell, and do in fact purchase and sell, a very large amount of the competitive goods of other manufacturers, so that there is abundant competition in the manufacturing and wholesale selling and in the retailing. None of the incidental agreements add to or change these essential features. The things incidentally agreed to would be done if there were no such agreement, if those essential features of the plan existed.

The real things which arrest attention about the United Drug Company are the quality of its goods, their reputation, and its great success and size; and such influence as it exerts flows from these accomplishments. There is nothing in the policy of our common or statute law that prohibits these accomplishments by original creation not pushed to the point where there is danger of a monopolistic combination.

The Standard Oil Company, the American Tobacco Company, and the Harvester Company were all combinations of existing competitors, and some of them had indulged in methods generally recognized as unfair, and all of them had attained so large a proportion of the existing products and manufacturing facilities of the country as to exercise, in the judgment of the court, an injurious control over prices and competition in excess of that required for the normal development of their own business, and to be, in the view of the Supreme Court in two of the cases and of a majority of the district court in the third, virtual, if not absolute, monopolies. No such situation is presented here. The United Drug Company does and can do only such a small percentage of the business of the United States of the kinds in which this company is engaged that there is no danger that it seeks to or can monopolize this business or any department of it.

Very truly, yours,

LOUIS D. BRANDEIS,  
FREDERIC E. SNOW,  
*Counsel for United Drug Co.*

#### LIGGETT EXHIBIT 1A.

*Inventory of School Street store taken in April, 1915, of products for laxative purposes manufactured by the United Drug Company.*

Name of article.	Cost of article.	Total investment.
Rexall Orderlies.....	\$12.85	
H. & L. Citrate Magnesia No. s.....	.98	
H. & L. Soda Phos.....	.06	
Liggett's Cascara Tabs.....	.08	
Rexall Ko Kas Kets.....	.83	
H. & L. Ko Kas Kets.....	.55	
Pill Cascara Comp. No. 3, Hinkle.....	.22	
		\$15.57

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, their products and total investment.*

[Total investment, \$269.95.]

Name of manufacturers and articles.	Cost of article.	Total investment.
Sharpe & Dohne, Baltimore, Md.:		
Sal Laxa.....	\$0.14	
Liggett's Glycerine Supp.....	2.35	
Lapactic Pills.....	2.88	
Liggett's Comp. Cathartic Pills.....	6.06	
		\$11.43

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
H. K. Mnlford Co., Philadelphia:		
Laxative Salts.....	\$1.28	
Chocolate Thallets.....	.54	
Cascara Comp. Tabs., No. 2.....	.13	
Cascara Tab.....	.38	
A. B. S. & Cascara, No. 1.....	.30	\$2.63
E. H. Squibb & Sons, Brooklyn, N. Y.:		
Sodium Phosphate.....	.56	
Hall's Bad Salts.....	.66	
Cascara Tabs.....	.54	1.76
Fraser Tablet Co., Brooklyn, N. Y.:		
Cascara Comp. Pills.....	.28	
Cascara Comp. Tabs.....	.07	.35
H. K. Wampole & Co., Philadelphia, Pa.:		
Cascarilla Bark.....	.46	
Alvinine Supp.....	.62	.108
Keasby & Mattison, Ambler, Pa.:		
Salaperient.....	.28	
Phosphate of Soda.....	.28	
Cafetonique.....	.71	
Alkaliphia.....	1.38	2.65
W. R. Warner & Co., Philadelphia, Pa.:		
Cascara Cathartic Pills.....	1.02	
Cascara Cathartic Granules.....	1.28	
Cascara Tablets.....	.55	5.50
Upjohn & Co., Kalamazoo, Mich.:		
Phenolax Wafers.....	7.91	
Cascara Tab.....	.28	8.19
Parke Davis & Co., Detroit, Mich.:		
F. E. Cascara Sagrada.....	.49	
Cascara Evacuant.....	2.42	
Cascara Cordial.....	.53	
Rhubarb Fingers.....	.60	
F. E. Comp., U. S. P.....	.60	
Agar.....	.67	
Cascara Sagrada Pills.....	1.28	
Glycerine Supp.....	.84	
A. B. S. & Cascara Tabs.....	.22	
Cascara Tabs.....	.55	
Cathartic Com. Pills.....	.14	
Tab. Rhubarb, 5 gr.....	.11	8.45
Charles Kilgore & Co., New York City, N. Y.: Cascara Comp. Tabs.....	3.64	3.64
John Wyeth & Bro., Philadelphia, Pa.:		
G. E. Citrate Magnesla.....	3.33	
G. E. Soda Phos.....	2.34	
Santonin & Calomel Loz.....	1.24	
Glycerine Supp.....	5.75	
Calomel Tabs.....	1.78	
Cascara Tabs.....	4.29	
Cascara Comp. Tab., D'Arcy.....	.70	
Calomel & Santonin Tab.....	.85	
A. B. S. & Cascara Pills.....	.70	
A. B. S. Cascara Pills, No. 2.....	.20	
A. B. S. & Cascara Pills, No. 1.....	.10	
Pill, Anti-Constipation, Clarke.....	.34	
Cascarine Comp. Tabs., No. 3.....	.28	
Cathartic Comp. Tabs., Improved.....	.41	
A. B. S. & Cascara Tabs., No. 2.....	.10	
Pill, Anti-Constipation.....	.24	
Tab. Rhubarb Comp., Imp., No. 4.....	.10	
Tab. Cascara Comp., No. 1.....	.10	
Pill Cascara.....	.15	
Pill Cascara Comp., No. 3.....	.20	
Tab. Rhubarb Comp.....	1.58	
Tab. Rhubarb Iperac Comp.....	.40	
Tab. Cathartic Active.....	.30	
Pill A. B. S. & Calomel, No. 9.....	.15	
Pill A. B. S. & Calomel, No. 2.....	.15	
Pill A. B. S. & Calomel, No. 3.....	.15	
Pill Cascara Comp., No. 2.....	.60	
Pill Cascara Comp., Hinkle.....		

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
<b>John Wyeth &amp; Bro., Philadelphia, Pa.—Continued.</b>		
F. E. Cascara.....	\$0.49	
Pill Cathartic Comp., U. S. P.....	.27	
F. E. Rhubarb Tabs., $\frac{1}{4}$ min.....	.10	
Pill Rhubarb Comp.....	.23	
Tab. Cathartic Comp., Vegetable.....	.64	
Tab. Calomel & Rhubarb Comp.....	.87	
Ovolax.....	.14	
		\$29.61
<b>Natural products not manufactured, obtainable from numerous sources:</b>		
Rochelle Salts.....	3.53	
Epsom Salts.....	8.60	
Calomel.....	1.10	
Castor Oil.....	1.33	
Sweet Tr. Rhubarb.....	4.62	
F. E. Cascara Sagrada Aromatic.....	8.32	
Cassia Fisula.....	.03	
Cascarilla Bark.....	.18	
Syrup Senna Comp.....	.38	
Aromatic Syrup Senna.....	.38	
Powd. Extract Cascara.....	.21	
Powd. Rhubarb Comp.....	.12	
Tr. Rhubarb, Plain.....	.69	
Licorice Powder.....	.05	
F. E. Cascara Sagrada, Plain.....	2.41	
Senna Leaves.....	.13	
Glauber Salts.....	.04	
		32.14
<b>A. O. Bliss Medical Co., Washington, D. C.:</b>		
Bliss Tea.....	2.91	
Bliss Native Herb Tabs.....	.98	
		4.19
<b>Sterling Remedy Co., Wheeling, W. Va.:</b>		
Hobb's Sparagass Pill.....	2.05	
Cascarets.....	3.95	
		6.00
<b>G. S. Stoddard &amp; Co., New York City: Stoddard Cascara Tabs.....</b>		
	.90	.90
Pinkham Medicine Co., Lynn, Mass.: Pinkham's Liver Pills.....	.92	.92
St. Helens, Lancashire, England: Beecham's Pills.....	5.77	5.77
Sultan Drug Co., St. Louis, Mo.: Prunoids.....	.63	.63
Paracampb Manufacturing Co., Louisville, Ky.: Paralax Tabs.....	1.25	1.25
McKesson & Robbins, New York City, Cathartic Comp. Pills.....	.39	.39
Wright India Vegetable Pill Co., New York City, Wright India Veg. Pill.....	2.24	2.24
Dr. Kilmer Co., Binghamton, N. Y., Parilla Pills.....	.22	.22
<b>Mother Segal Syrup Co., New York City:</b>		
Mother Segal Operating Pill.....	.43	
Laxall.....	.68	
		1.11
<b>G. W. Mortimer Co., Boston, Mass.: McGale's Butternut Pills.....</b>		
	.63	.63
Vanderboof Co., South Bend, Ind., Summers Pills.....	.35	.35
J. Ballard, St. Louis, Mo.: Dr. Swain's Pills.....	.17	.17
<b>E. Fougere &amp; Co., New York:</b>		
Tama! Indin.....	.68	
Enos Pills.....	1.90	
Enos Salts.....	3.17	
		5.95
<b>E. L. Patch Co., Boston, Mass.:</b>		
Tus-Lax.....	.17	
Cascara Laxative Tabs.....	.40	
Cascara Comp. Tabs, No. 1, Imp.....	.18	
		.22
<b>Giant Oxie Co., Augusta, Me.: Oxine Tabs.....</b>		
	.30	.30
Tracy Co., New London, Conn.: Tracy Evacuants.....	1.68	1.68
F. H. Strong, New York City: Ulox.....	.90	.90
New England Laboratories, Lynn, Mass.: Bu-Lax.....	.45	.45
<b>Fleming Bros., Pittsburgh, Pa.:</b>		
McLean's Lovengers.....	.40	
McLean's Pills.....	.38	
		.78
<b>Castor Lax Co., New York City: Castor Lax.....</b>		
	.81	.81
Kellogg Food Co., Battle Creek, Mich.: Colax.....	.30	.30
Wells-Richardson Co., Burlington, Vt.: Will's English Pills.....	.15	.15
B. Weeks & Co., Des Moines, Iowa: Week's Laxative Wafers.....	.43	.43
W. T. Hanson Co., Schenectady, N. Y.: William's Pink Pills.....	.88	.88
<b>W. H. Hill Co., Detroit, Mich.:</b>		
Hill's Kidney Cascara Tabs.....	.91	
Hill's Cascara Quinine.....	2.11	
		3.02

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
Harris Medicine Co., St. Louis, Mo.: Grove's Laxative Bromo Quin.....	\$1.35	\$1.35
Blackburn Products Co., Dayton, Ohio:		
Blackburn Cascaroal Pills.....	.62	
Sulphurb.....	1.50	2.12
Booth Hyomei Co., Buffalo, N. Y.: Booth's Pills.....	.60	.60
Kellogg & Hitchcock, New York City:		
Japol Tablets.....	.30	
O-Joy Tablets.....	.45	.75
Albert Medicine Co., Oakland, Me.:		
Albert's Little Dinner Pills.....	.95	
Albert's After Dinner Pills.....	.28	1.23
Hollingsworth Smith Co., Orangeburgh, N. Y.:		
Bell's Anti-Ferment Tabs.....	.29	
Bell's Cascarins.....	2.71	3.00
Auto-Tox Co., Boston, Mass., Auto Tox Tabs.....	.41	.41
World's Dispensary Medical Association, Buffalo, N. Y.:		
Pierce's Favorite Pres. Tab.....	.60	
Pierce's Pellets.....	.23	.83
C. I. Hood Co., Lowell, Mass.:		
Pepton Pills.....	.60	
Hood's Pills.....	.15	.75
I. S. Johnson, Boston, Mass.: Parson's Purgative Pills.....	.59	.59
Dr. Williams Co., Schenectady, N. Y.: Pinklets.....	.44	.44
J. C. West Co., Chicago, Ill.: West Liver Pills.....	.10	.10
Dr. Tuck Manufacturing Co., New York City: Tuck's Liver Pills.....	.24	.24
Warner's Safe Remedy Co., Rochester, N. Y.: Warner's Safe Pills.....	.43	.43
Mansfield Laboratories, Mansfield, Mass.: Agar Agar Wafers.....	1.03	1.03
C. C. Ayer Co., Lowell, Mass.: Ayer's Pills.....	.45	.45
Pyramid Drug Co., Marshall, Mich.: Pyramid Pills.....	.30	.30
A. C. Meyer & Co., Baltimore, Md.: Bull's Pills.....	.12	.12
Blood Wine Co., St. Louis, Mo.: Bloodwine Liver Pills.....	.43	.43
Malena Co., Detroit, Mich.: Malena Pills.....	.29	.29
Alcock Manufacturing Co., New York City: Brandreth Pills.....	1.35	1.35
Burroughs Welcome Co., New York City: Cascara Tablets.....	1.91	1.91
Bell Remedy Co., Albany, N. Y.: Tee Lax.....	.06	.06
Brown Herh Co., New York City: Brown's Herh Tabs.....	.57	.57
Baker Pill Co., Augusta, Me.: Baker's Kidney Pills.....	.32	.32
W. S. Berkhardt, Columbus, Ohio: Berkhardt's Veg. Pills.....	.57	.57
Schieffelin & Co., New York City: Colin Laxative.....	.68	.68
Irving Drug Co., Philadelphia, Pa.: California Prune Wafers.....	.18	.18
Carter Medicine Co., New York City: Carter's Little Liver Pills.....	1.75	1.75
Frederick Stearns & Co., Detroit, Mich.: Choco Lax Wafers.....	.47	.47
R. V. Pills Co., Portland, Me.: Clarke's Red Iron Pills.....	1.00	1.00
L. W. Griffin, Boston, Mass.: Wild Cucumber Pills.....	.16	.16
Z. C. DeWitt Co., Chicago, Ill.: DeWitt's Little Early Riser.....	.48	.48
Potter Drug & Chemical Co., Boston, Mass.: Cuticura Pills.....	.35	.35
L. Brown, New York City: Globe Pills.....	.32	.32
Foster Milburn Co., New York City: Doan's Regulets.....	.33	.33
Edward Olive Tabs Co., Columbus, Ohio: Edward Olive Tabs.....	.88	.88
Schenck Chemical Co., New York City: Edward's Dandelion Pills.....	1.00	1.00
Danderlion Pill Co., Hartford, Conn.: Trowbridges Danderlion Pill.....	.32	.32
Fruititive (Ltd.), Ogdensburg, N. Y.: Fruititives.....	1.04	1.04
A. Rouseire, Paris, France: Frank's Grains of Health.....	.22	.22
Bristol Myers Co., Brooklyn, N. Y.:		
Gastrogen Tabs.....	.60	
Sagraphin Tabs.....	.33	
Clinton's Cascara Active.....	.38	
Sal Hepatica.....	16.95	18.76
J. M. Cummings, Syracuse, N. Y.: Grime's Mandrake Pills.....	.15	.15
Kells & Co., Newburgh, N. Y.: Graham's Butternut Pills.....	.57	.57
Dr. F. A. & J. A. Green, Boston, Mass.: Green's Laxura Pills.....	.58	.58
J. V. Hale & Co., Boston, Mass.: Hale's Tabs Sagrada.....	.41	.41
F. J. Cheney Co., Toledo, Ohio: Hall's Family Pills.....	.75	.75
Kalmus Chemical Co., Cincinnati, Ohio: Guertin's Laxative Liver Pill.....	.11	.11
Grafenburg Co., New York: Grafenburg Pills.....	.44	.44
Ex Lax Co., New York: Ex Lax.....	1.26	1.26
J. Gaulamains le Bins, France: El Zernac Laxative.....	1.20	1.20
Mead Johnson Co., Jersey City, N. J.: Carol Laxative.....	1.43	1.43
Franco-American Co., Montreal, Canada: Purgatives.....	.65	.65
British College of Health, London, England: Morrison's Pills.....	1.31	1.31
Dr.-Scale Pill Co., Kalamazoo, Mich.: Scale's Pills.....	.61	.61
Ivan Chemical Co., Cambridge, Mass.: Ivan-Lax.....	.36	.36

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
McKallor Drug Co., Binghamton, N. Y.: Dr. Hamilton's Pills.....	\$0.15	\$0.15
Five Drop Remedy Co., Chicago, Ill.: Swanson's Pills.....	.33	.33
Philo Hay Specialty Co., Newark, N. J.: Skin Health Pills.....	.86	.86
P. Neudeistei & Co., New York: St. Bernard's Pills.....	.43	.43
W. F. Smith, Boston, Mass.: Smith's Pineapple and Butternut Pills.....	.65	.65
F. A. Steward Co., Marshall, Mich.: Steuart Calcium Wafers.....	.86	.86
Dr. J. H. Schenck & Sons, Philadelphia: Schenck's Pills.....	1.03	1.03
W. R. Warner & Co., Philadelphia, Pa.: Kickapoo Herbllets.....	.73	
Kings New Life Pills.....	1.50	
E. Heffenberg Chemical Works Co. (Ltd.), Heffenberg, Germany: Regulin Tablets.....	.43	1.83
Regulin Tea.....	.29	
T. Restieaux, Boston, Mass.: Restieaux Liver Pills.....	.99	.72
Rival Herb Co., Detroit, Mich.: Rival Herb Tabs.....	.55	.99
Ripian Chemical Co., New York City: Ripans.....	1.20	.55
Rosebud Tabule Co., New York City: Rosebuds.....	.62	1.20
Miles Medicine Co., Elkhart, Ind.: Miles' Laxative Tabs.....	.59	.62
Diamond Laboratory Co., Naugatuck, Conn.: May's Health.....	.15	.59
Yates Chemical Co., New York City: Lascaro Tablets.....	.13	.15
F. Eberlein Co., Chicago: Koenig's Herb Pills.....	.24	.13
C. I. Topliff, New York: Pavara Pills.....	1.67	.24
W. H. Comstock, Morristown, N. Y.: Morse's Indian Root Pills.....	.45	1.67
Liquizone Chemical Co., Chicago, Ill.: Liquizone Laxative Tabs.....	.60	.45
Lazy Liver Pill Co., New York City: Lazy Liver Pills.....	.11	.60
Jacques Medicine Co., Boston, Mass.: Jacques Liver Pills.....	.15	.11
Dr. D. Jayne & Son, Philadelphia, Pa.: Jaynes Alteratives.....	.60	.15
Jaynes Liver Pills.....	.32	
Elvita Medical Co., Boston, Mass.: Halleck Elvita Pills.....	.45	.92
Andreas Saxlehner, Budapest, Austria-Hungary: Hunyadi Janos Pills.....	.30	.45
Hunyadi Janos Water.....	1.00	
International Drug Co., Boston, Mass.: Blake's Native Herb Tabs.....	2.06	1.30
Partola Co., New York City: Partola.....	.57	2.06
Eli Lilly Co., Indianapolis: Lilly's Glycerine Supp.....	.26	.57
Abbott Alkaloid Co., Chicago, Ill.: Abbott's Saline Laxative.....	2.00	.26
Wendell Pharmaceutical Co., New York, N. Y.: Wendell's Ambitions Salts.....	.16	2.00
A. A. Burnham, Roxbury, Mass.: Sal Alternat.....	1.51	.16
Cystogen Chemical Co., St. Louis, Mo.: Cystogen Aperient.....	1.14	1.51
R. Fabyra, Boston, Mass.: Faybra Salts.....	1.54	1.14
Bad Em Salts Co., Philadelphia: Bad Em Salts.....	1.18	1.54
Dusal Chemical Co., New York City: Sal Eliminant.....	2.10	1.18
Hollister Drug Co., New York City: Rocky Mountain Tea.....	.40	2.10
Rocky Mountain Nuggets.....	.60	
A. H. Lewis Medicine Co., St. Louis, Mo.: Natures Remedy.....	.60	1.00
French Lick Springs Co., French Lick, Ind.: Pluto Water.....	3.02	.60
W. S. Merrill Co., Cincinnati, Ohio: Merrill's Laxatina.....	.72	3.02
Leytles Bros., New York City: Rubiyant Water.....	.48	.72
C. Oppel & Co., Friedrichshall, Germany: Friedrichshall Water.....	.23	.48
J. H. Zeilin & Co., St. Louis, Mo.: Zeilin Liver Regulator.....	.58	.23
S. C. Wells & Co., Le Roy, N. Y.: Carter's K. & B. Tea.....	.46	.58
Celery King.....	.15	
S. R. Field & Co., Cleveland, Ohio: Paragon Tea.....	.23	.61
St. Jacobs Oil Co., Cincinnati: Hamberg Pressed Tea.....	.57	.23
Abbey Effervescent Salt Co., New York City: Abbey's Salts.....	.56	.57
Wingate Chemical Co., Rouses Point, N. Y.: Sal Litha Phos.....	.92	.56
Pinus Medicine Co., Los Angeles, Cal.: Fruitola.....	.64	.92
Hexamine Co., Syracuse, N. Y.: Hexamine.....	.45	.64
Thron & Co., Boston, Mass.: Thorn's Saline Laxative.....	.55	.45
Clay Godson Co., New York City: Kaiser Bad Salts.....	.29	.55
Crab Orchard Water Co., Louisville, Ky.: Crab Orchard Salts.....	.29	.29
Kellogg Co., Buffalo, N. Y.: Kellogg Tasteless Castor Oil.....	.88	.88
Centaur Co., New York: Castoria.....	8.40	.88
O. H. Jadwin, New York City: Jad Salts.....	1.28	8.40
Lubel Schottlandur, Karlsbad, Austria: Karlsbad Sprudel Salts.....	2.71	1.28
Vass Chemical Co., Danbury, Conn.: Thyalin.....	.32	2.71
Tarrant Co., New York: Tarrant Seltzer Aperient.....	1.12	.32
Independent Pharm. Co., Worcester, Mass.: Sal Renoline.....	.99	1.12

*Inventory of School Street store taken in April, 1915, of products advertised and sold for laxative purposes listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
Garfield Tea Co., Brooklyn, N. Y.:		
Garfield Tea Syrup.....	\$0.60	
Garfield Tea.....	.78	
Vinol Co., Boston, Mass.: Vin-Lax.....	.45	\$1.38
Hartshorn & Sons, Boston, Mass.: Hartshorns Aromatic Syrup Rhubarb.....	.24	.24
Egyptian Drug Co., New York City: Egyptian Regulator Tea.....	1.21	1.21
Red Raven Corporation, Red Raven, Pa.: Red Raven Splits.....	.17	.17
Albolena Co., Albolena, Kans.: Albolena Water.....	.51	.51
Sperry Medicine Co., Waterbury, Conn.: Saxony Tea.....	.14	.14
California Fig Syrup Co., Wheeling, W. Va.: California Syrup Figs.....	2.10	2.10

## LIGGETT EXHIBIT 1B.

*Inventory of School Street store April, 1915, of hair tonics manufactured by the United Drug Company.*

Article.	Cost of article.	Total investment.
Harmony eau quinine.....*	\$1.33	\$1.33
Harmony hair beautifier.....	4.65	4.65
Rexall Hair Tonic.....	8.69	8.69

Total investment, \$14.67.

*Inventory of School Street store April, 1915, of products advertised and sold for hair tonics listed by manufacturers, the articles and investment.*

[Total investment, \$99.28.]

Name of manufacturers and articles.	Cost of article.	Total investment.
Colgate & Co., New York City:		
Quinol Hair Tonic.....	\$2.01	
Vaseline Hair Tonic.....	.95	
Wyeth Chem. Co., New York City: Wyeth Sage & Sulphur.....	13.71	\$2.96
Knowlton Danderline Co., Chicago, Ill.: Danderline.....	5.54	13.71
Herpicide Co., Detroit, Mich.: Herpicide.....	4.16	5.54
Outside preparations purchasable from many sources: Bay Rum.....	6.19	4.16
Richard Hudnut Co., New York City:		6.19
Eau De Quinine.....	1.50	
Bay Rum.....	.33	
H. & G. Klotz, New York City: Pinaud's Eau Quinine.....	4.85	1.83
Roger & Gallet, Paris, France: Roger & G. Eau Quinine.....	.34	4.85
H. Michelson & Son, New York City: Michelson Bay Rum.....	.09	.34
R. Martin, Boston, Mass.: Martin's Hair Tonic.....	.27	.09
Hale & Co., Boston, Mass.: Hale's Toniquin.....	.33	.27
S. R. Vanduzer: Allen's Hair Restorer.....	.77	.33
Seven Sutherland Sisters, New York City: S. S. Hair Growers.....	.45	.77
A. Rhodes, Lowell, Mass.: Rhodes Hair Lotion.....	.33	.45
Imperial Chemical Co., New York: Imperial Vigorisor.....	.57	.33
Fitch Ideal Danderuff Co., Boone, Iowa: Fitch Danderuff Remover.....	.53	.57
Kells Co., Newburgh, N. Y.: Coke Danderuff Cure.....	1.43	.53
Caswell Massey Co., New York City: C. M. & Co. Bromo Quinine.....	.90	1.43
J. Burnett Co., Boston, Mass.: Burnett's Cocaine.....	1.24	.90
I. T. Noonan Co., Boston, Mass.: Zepp's Lustral.....	1.35	1.24
A. Rhodes, Lowell, Mass.: Rhodes Rejuvenator.....	.48	1.35
Milbans & Kropfs, New York: Captol.....	.63	.48
J. Burnett Co., Boston: Kalliston.....	.57	.63
H. W. Taylor & Co., New York City: Corrollas.....	1.18	.57
Carbolene Co., New York City: Carbolene.....	.57	1.18
Bruceline Co., New York: Bruceline.....	.58	.57
Paul Westphal, New York City: Westphal's Auxiliator.....	.19	.58
		.19

*Inventory of School Street store April, 1915, of products advertised and sold for hair tonics listed by manufacturers, the articles and investment—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
Caswell Massey Co., New York City: Glyceria.....	\$0 53	\$0.53
W. J. Barker, New York City: Barker's Hirsutus.....	3.50	3.50
Mdme Yale Co., New York City: Mdme Yale Hair Tonic.....	2.25	2.25
Boericke & Taffel Co., New York City: Laneo.....	.80	.80
E. Fougere & Co., New York City: Edward's Hairline.....	.28	.28
Larimore & Co., Baltimore, Md.: Larimore's Excelsior H. Tonic.....	4.00	4.00
Kells Co., New York: Cleana Tonic.....	1.03	1.03
Mdme. Gillespie, Boston, Mass.: Gillespie Scalp Invigorator.....	2.00	2.00
Calder Co., Providence, R. I.: Calder's Quinitol Tonic.....	.29	.29
Ruth Paxton Co., Boston, Mass.: Mason's Indian Hair Tonic.....	1.20	
Mason's Old English Tonic.....	1.80	
Herbex Co., New York City: Herbex.....	1.18	3.00
Wells, E. S., Jersey City, N. J.: Well's Hair Balsam.....	.34	1.18
Philo Hay Specialty Co., Newark, N. J.: Hay's Hair Health.....	1.22	.34
Hiscox Co., Patchogue, N. Y.: Parker's Hair Balsam.....	1.55	1.22
G. Graham, Chicago: Graham's Hair Restorer.....	2.11	1.55
Regal Co., Boston, Mass.: Regal Hair Tonic.....	1.80	2.11
Carpine Co., Boston, Mass.: Carpine Hair Tonic.....	1.80	1.80
G. Graham, Chicago: Cactoco Hair Tonic.....	1.13	1.80
Lyon Manufacturing Co., Brooklyn, N. Y.: Lyon's Catharina.....	.57	1.13
Girox Manufacturing Co., Buffalo, N. Y.: Parisian Sage.....	.60	.57
Swissco Co., Cincinnati, Ohio: Swissco Hair Tonic.....	.81	.60
Baldpate Co., New York City: Baldpate Hair Tonic.....	.57	.81
Hall Co., Nashua, N. H.: Hall's Hair Renewer.....	1.20	.57
J. C. Ayre Co., Lowell, Mass.: Ayer's Hair Invigorator.....	1.20	1.20
J. J. McDonald, New York City: McDonald's H. Restorer.....	.32	.32
Goldman Co., St. Paul, Minn.: Goldman's Hair Tonic.....	1.00	
Goldman's Hair Restorer.....	2.00	
Bayroma Co., New York City: Bayroma.....	.54	3.00
Andrew Jergens, Cincinnati: Woodbury's Combination Tonic.....	.30	.54
Woodbury's Hair Tonic.....	.60	
T. Noonan, Boston, Mass.: Crown Hair Grower.....	1.20	.90
Rauchfoos Co., New York City: Armiraculous.....	.79	1.20
Barkley & Co., New York City: Barry's Tricopherous.....	.57	.79
R. P. Hall Co., Nashua, N. H.: Hall's Hair Promoter.....	.67	.57
Crudol Co., New York City: Crudol.....	.29	.67
E. J. Medina, Lowell, Mass.: Medina Hair Tinter.....	1.18	.29
Brookline Chemical Co., Boston, Mass.: Farr's Restorer.....	3.23	1.18
G. Graham, Chicago, Ill.: Graham H. Restorer.....	.53	3.23

## LIGGETT EXHIBIT 1C.

*Inventory of School Street store April, 1915, of dyspepsia remedies manufactured by the United Drug Co.*

Name of article.	Cost of article.	Total investment.
Rexall Dyspepsia Tabs.....	\$7.15	
Rexall Gastric Tabs.....	3.30	
Rexall Soda Mint Tabs.....	1.09	
Hall & Lyon Essence Pepsin.....	.22	
U. D. Co. Pepsin Tabs.....	2.16	
Rexall Charcoal Tabs.....	.58	
Hall's Peptabs.....	.40	
Liggett's Sodamints.....	3.04	
Rexall Pepsin Tabs.....	.80	
Hoff's Dyspepsia Remedy.....	.19	
Liggett's Charcoal Tabs.....	.02	
Hall's Soda Mint Tabs.....	.03	
H. & L. Essence Pepsin.....	.88	
		\$20.04

Total investment, \$20.04.

*Inventory of School Street store April, 1915, of articles advertised and sold for dyspepsia and listed by manufacturers, articles, cost and total investment.*

[Total investment, \$121.88.]

Name of manufacturer and article.	Cost of article.	Total investment.
<b>Fairchild Bros. &amp; Foster, New York City:</b>		
Panopeptone.....	\$4.40	
Essence Pepsin.....	3.44	
Pepule of Pepsin & Pancrean.....	.42	
Pepule of Bismuth & Pancreatin.....	.64	
Pepule of Pepsin & Nux.....	.32	
Pepule of Pepsin.....	.96	
Pepule of Pepsin & Bismuth.....	1.59	
Scale Pepsin.....	.53	
		\$12.31
<b>Charles Kilgore, New York City:</b>		
Tab Pepsin & Pancretin.....	.32	
Tab Anti Fermentative.....	.40	
		.72
<b>E. R. Squibb &amp; Son, Brooklyn, N. Y.:</b>		
Tab Pepsin & Pancreatin Comp.....	.10	
Soda Bicarbonate.....	.66	
		.76
<b>Fraser Tab. Co., Brooklyn, N. Y.:</b>		
Soda Granules.....	.14	
Digestive Tabs.....	.41	
Absorbent Dyspeptic Tab.....	.36	
		.91
<b>W. R. Warner &amp; Co., Philadelphia, Pa.:</b>		
Pill Digestive.....	.27	
Tab Soda Bicarb & Ginger.....	.13	
Liquid Pancreo & Pepsin.....	.59	
		.99
<b>New York Pharmacal Co., Yonkers, N. Y.:</b>		
Elixir Lacto Peptine.....	3.71	
Powd. Lacto Peptine.....	1.80	
Dry Peptonoids.....	1.02	
Liquid Peptonoids & Creosote.....	1.39	
Lactopeptine Tabs.....	2.03	
Liquid Peptonoids.....	.48	
Liquid Lactopeptine.....	1.95	
Elix. Lactopeptine & Bismuth.....	.79	
		13.17
<b>Burroughs, Welcome &amp; Co., New York:</b>		
Thyroid Gland Tabs.....	1.56	
Tab. Papava.....	.55	
		2.11
<b>Read &amp; Carnrick, Jersey City, N. J.:</b>		
Peptozine Powd.....	1.85	
Peptozine Elixir.....	2.13	
Peptozine Tablets.....	1.23	
		5.21
<b>Outside preparations purchased from numerous sources:</b>		
Charcoal.....	.10	
Sodium bicarb.....	1.99	
Pure Pepsin.....	.35	
Pepsin Sacch.....	.02	
Liquid Pepsin.....	.30	
Scale Pepsin.....	.26	
Rhubarb & Soda Mix.....	.48	
		3.50
<b>Sbarpe &amp; Dohme, Baltimore, Md.:</b>		
Panpeptic Elix.....		
<b>Armour &amp; Co., Chicago:</b>	.90	.90
Insoluble Pepsin.....	.35	
Pure Pancretin.....	.43	
Pure Pepsin.....	.33	
Pepsin Tab.....	.43	
		1.54
<b>Johnson &amp; Johnson, New Brunswick, N. J.:</b>		
Papoids.....		
<b>Upjohn &amp; Co., Kalamazoo, Mich.:</b>	3.71	3.71
Tab Claripeptic & Charcoal.....		
<b>Parke, Davis &amp; Co., Detroit, Mich.:</b>	.68	.68
Lactated Pepsin.....		
Elix. Lactated Pepsin.....	.25	
Lactone Tabs.....	.62	
	.68	
<b>John Wyeth &amp; Brother:</b>		.155
Pure Pancreatin.....	.11	
Charcoal Tabs.....	.85	
Sodamint & Pepsin Tab.....	1.05	



*Inventory of School Street store April, 1915, of articles advertised and sold for dyspepsia and listed by manufacturers, etc.—Continued.*

Name of manufacturers and articles.	Cost of article.	Total investment.
<b>John Wyeth &amp; Brother:—Continued.</b>		
Pure Pepsin.....	\$1.00	
Tab Anti Dyspeptic.....	1.36	
Tab Pepsin & Pancreatin.....	1.19	
Tab Pepsin & Bismuth.....	.45	
Tab Soda Bicarb.....	.66	
Elix. Pepsin Lactated Comp.....	.80	
Tab Charcoal & Soda.....	1.00	
Pepsin Tabs.....	2.98	
Lozengers Ginger & Bicarb Soda.....	.20	
Sacch Pepsin.....	.36	
Pepsin & Pancreatin Tabs.....	1.93	
Pepsin Bismuth & Nux Tabs.....	1.79	
Pepsin & Strychnine Tabs.....	.53	
Tab Dyspepsia.....	.69	
Tab Pepsin & Nux.....	.20	
Tab Osgall Pepsin & Pan.....	1.15	
Glycerol Pepsin.....	.50	
Elix Digestive Comp.....	1.24	
Elix P. B. & S.....	2.15	
Bismuth Nitrate Tabs.....	.71	
Tab Lady Webster.....	.28	
Elix Pepsin & Thymol Comp.....	.17	
Essence Pepsin.....	.15	
<b>E. L. Patch Co., Boston, Mass.:</b>		\$23.50
Elix Pepsin Lactated.....	1.65	
Elix Digest Hypophos.....	1.08	
<b>C. I. Hood Co., Lowell, Mass.: Hood's Dyspeplets.....</b>	2.55	2.73
<b>Bell &amp; Co., Orangeburgh, N. Y.: Bell-ans.....</b>	5.42	2.55
<b>Thorn &amp; Co., Boston: Liquid Digestion Comp.....</b>	.83	5.42
<b>Geo. C. Frye, Portland, Maine: Frye's Pancreo Bis. &amp; Pepsin.....</b>	2.25	.83
<b>Criswell Chemical Co., Washington, D. C.: Bromate Pepsin.....</b>	.13	2.25
<b>Humphrey Drug Co., Newark, N. J.: Bromate Pepsin.....</b>	.48	.13
<b>J. B. Noyes Mfg. Co., Lancaster, N. H.: Noyes Dyspepsia Tabs.....</b>	.20	.48
<b>Allston Co., East Saugus, Mass.: Peptonix Tabs.....</b>	.91	.20
<b>Bristol Myers Co., Brooklyn, N. Y.:</b>		.91
Elix Digest of Comp.....	.50	
Clinton's Digestive Tab.....	.15	
<b>Mead Johnson Co., Jersey City, N. J.:</b>		.65
Caroid & Soda Tabs.....	2.07	
Caroid & Charcoal Tabs.....	1.44	
<b>E. C. DeWitt, New York City:</b>		5.15
Kodal Dyspepsia Tabs.....	2.00	
Kodal Dyspepsia Rem.....	.90	
<b>Richards Tab Corp., New York City: Richards Dyspepsia Tabs.....</b>	.31	2.90
<b>F. A. Steuart Co., Marshall, Mich.: Steuarts Dyspepsia Tabs.....</b>	2.00	.31
<b>G. S. Stoddard Co., New York City: Pepto Papya.....</b>	.68	2.00
<b>N. E. Cereal Co., New York City: India Digestive Biscuits.....</b>	.30	.68
<b>A. Wulff Co., New York City: Formamint Tabs.....</b>	1.01	.30
<b>C. A. Siegemund, Boston, Mass.: Woodsbury's Dyspepsia Killers.....</b>	.33	1.01
<b>Mdme Yale Co., New York City: Yale's Dyspepsia Tabs.....</b>	.31	.33
<b>Blackburn Products Co., Dayton, Ohio: Triopeptine.....</b>	1.50	.31
<b>E. J. Moore Sons, New York City: Moore's Charcoal Tabs.....</b>	.36	1.50
<b>A. J. Ditman, New York City: Murrays Charcoal Tabs.....</b>	.15	.36
<b>Requa Mfg. Co., Brooklyn, N. Y.: Requa Charcoal Tabs.....</b>	.44	.15
<b>E. Fougere &amp; Co., New York City: Boudaults Pepsin.....</b>	.63	.44
<b>Pond Phar. Co., New York City: Pond's Digestans.....</b>	.73	.63
<b>Garfield Tea Co., Brooklyn, N. Y.: Garfield Digestive Tabs.....</b>	.71	.73
<b>Tracy Co., New London, Conn.: Gas Eliminant Tabs.....</b>	.72	.71
<b>Dr. J. A. Dean Co., Kingston, N. Y.: Dean's Dyspepsia Pills.....</b>	.14	.72
<b>Bauer Chemical Co., New York City: Sanatogen.....</b>	10.21	.14
<b>World's Dyspepsia Cure Co., Providence, R. I.: World's Dyspepsia Cure.....</b>	.31	10.21
<b>E. Fougere &amp; Co., New York:</b>		.31
Stomalix.....	.78	
Belloes Charcoal.....	1.37	
<b>A. J. White Co., New York City: Shaker's Digestive Cordial.....</b>	.79	2.15
<b>H. E. Morgan, Milford, Mass.: Morse's Dyspepsia Rem.....</b>	.31	.79
<b>G. A. Green, Woodbury, N. J.: Green's August Flower.....</b>	.54	.31
<b>Kells Co., Newburgh, N. Y.: Graham Dyspepsia Cure.....</b>	.71	.54
<b>Hanover Drug Co., New York City: Ellis Charcoal.....</b>	.12	.71
<b>Pepsin Syrup Co., Monticello, Ill.: Caldwell's Syrup Pepsin.....</b>	.26	.12
<b>McKesson &amp; Robbins, New York City: Powd. Willow Charcoal.....</b>	.04	.26

## LIGGETT EXHIBIT 1D.

[December 7, 1915.]

## GRIEVANCE COMMITTEE CASES.

In 1912 complaint was made of the City Drug Store, Mount Vernon, New York, because it owed nearly \$300 and its purchases had been very small. Agency was cancelled by vote of the grievance committee in September, 1913.

In the case of F. D. Ostrander, Gloversville, New York, complaints began February 19, 1913, to the effect that he had not made reasonable efforts to sell the United Drug Company's products; that from July 1, 1911, to July 1, 1912, he had only purchased \$664 worth of goods in a town of over 20,000 people. After correspondence during the year Mr. Ostrander suggested that he could probably be able to purchase in the vicinity of \$1,200 worth of goods a year, which arrangement appears to have been satisfactory and no further action was taken.

John E. Boyle, Fairfield, Connecticut. Complaint in 1912 about small amount of business, which was only \$213 for the year July 1, 1912, to July 1, 1913, and \$200 for the year July 1, 1913, to July 1, 1914. Agency cancelled in 1914.

H. W. Parks, Gardner, Massachusetts. Complaint in 1913—what a small amount of business he was doing, amounting to only about \$300 a year. Agency relinquished by Mr. Parks April 15, 1914.

John F. Paine, Newtonville, Massachusetts. Complaint, August, 1913. Purchases 1908-9, \$126; 1909-10, \$167; 1910-11, \$112; 1911-12, \$171; 1912-13, \$128. Cancelled in February, 1914. Voted that he ought to do a minimum business of \$1,000 a year.

William C. Pfau, Jeffersonville, Indiana. Complaint made in July, 1913, as to the business which he was doing. In a town of over 10,000 population his business amounted to only \$193 in the year 1911-12 and \$209 in 1912-13. Agency cancelled October 3, 1913.

Reinstated May 20, 1914. At the time of being reinstated he was told that his purchases ought to be at least from \$700 to \$800 a year. Apparently his purchases in 1914-15, after reinstatement, were only \$360, and the agency was again cancelled on May 12, 1915.

E. J. Parman, Decorah, Iowa. Complaint made in 1912 because he was selling too few goods. In 1911-12 he purchased \$339 worth. Agency cancelled January 29, 1913.

Coyne & Loveys, Johnstown, New York. Complaint of falling off of business and few purchases in 1913. Purchased in 1909-10, \$550; 1910-11, \$463; 1911-12, \$361; 1912-13, \$257. Agency cancelled.

## LIGGETT EXHIBIT 1E.

[December 13, 1915.]

## CASES WHERE NO FINAL ACTION HAS BEEN TAKEN.

Walker Drug Company, Ballinger, Texas; owned by a man named Weeks. Complaints about the amount of business done by this company began in 1913. It appears that the purchases for 1913-14 were \$94 and 1914-15 only \$53. It appears that Mr. Weeks was also a Nyal agent, and had written an article for the Nyal publication called Straight Talk stating that "For a long time I was the lone booster for the Nyal line in this store" and "my boys and I realize that the Nyal line is the best paying proposition in our drug store, and the more efforts we place behind the Nyal line, greater will be the resulting profits and the more satisfactory will be our trade relations."

On May 25, 1914, Mr. Weeks wrote to the United Drug Company, referring to the article that he wrote and which appeared in the Nyalist, that—

"I wrote personally and have no apologies for writing whatever. It may be that I will write another article again either for the same journal or for some other journal, and do not consider that they have anything to do with the agency for your line and believe that you will so agree with me."

The attitude of the United Drug Company is shown by their reply under date of June 8, 1914, to Mr. Weeks stating that—

"The fact that you wrote an article for the Nyalist should not be any consideration here. You have a perfect right to do anything that you want. We are willing to admit your stand is right on everything except the condition of your account with us in Ballinger, and that is the only issue that we can thrash out, and in speaking of this we have no criticism to make of your attitude toward anyone else or any other concern, and must rely upon your record with us. It seems that your purchases during the past year have amounted to around \$200 and an agency that gives us this amount of business is unprofitable to us."

On October 9, 1915, it was recommended that the Walker Drug Company be given a further trial in the belief that there would be a decided improvement in their affairs and in their attitude toward the drug company.

Indian River Drug Company, Cocoa, Florida. In June, 1915, apparently this concern claimed that the United Drug Company proposition had been misrepresented, particularly in regard to the free advertising which it would do. There has been some correspondence about it, but no final action was taken, it apparently being left to be determined whether or not the matter could be straightened out.

In 1913 there were complaints about Reismann Bros., Pueblo, Colorado, particularly because of their apparent lack of interest in the United Drug Company. It was shown that they claimed the management was extravagant and the whole thing was being run for the benefit of a crowd of insiders. Apparently no final action has ever been taken in regard to the matter.

Ernest K. Truitt, Middletown, Delaware. Agency opened in 1914, and it appears that he has never paid a dollar on account of any purchases. The company apparently has under consideration the question of terminating the agency because he has not made any payment on his account. No action has been taken.

The company has under consideration the agency of S. S. Butler, Camden, New Jersey, because of the poor showing he is making. Apparently no action has been taken.

Complaint about the amount of business done by Mr. Phillips, of Lostant, Illinois. The matter is held up in the hope that he will be able to do more business. Note that in your letter addressed to him on August 17 the company suggests that he ought to be able to buy ten per cent of his total purchases from the United Drug Company.

There has been more or less correspondence about J. G. Bruen, Dawson, Pennsylvania, because of his small purchases. No action.

Matter of W. A. Herpel, Baltimore, Maryland, is under consideration, owing to the very unsatisfactory condition of his account.

Also, the case of T. J. Britton, Dallas, Texas, is under consideration, owing to the unsatisfactory condition of his account.

W. F. Guertz, Los Angeles, California, failed to pay for goods purchased.

Carl Bechtel, Orville, Ohio, fails to pay for goods purchased.

Walter J. Bangs, Madison, Kansas, fails to pay for goods purchased.

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#### LIGGETT EXHIBIT No. 2.

#### REPORT ON UNITED DRUG COMPANY.

[Original of this report taken to Washington by Mr. Anderson on April 12, 1916.]

APRIL 12, 1916.

The ATTORNEY GENERAL,  
Washington, D. C.

SIR: Under date of September 24, 1915, I wrote the Attorney General as follows:

"The attention of the department is directed to the enclosed newspaper memorandum referring to the purchase by the United Drug Company of another large chain of drug stores. As I understand these plans, it seems to me that it is a fair question as to whether they are not obnoxious to the Sherman Act. Is it the desire of the department that any investigation should be undertaken in this office?"

Under date of September 28, 1915, this letter was acknowledged by Mr. Todd, and he added:

"The department thinks it would be well for you to ascertain and report all the facts in respect of this transaction as a basis for considering its legality."

This commission to report "all the facts" is a larger undertaking than the time and forces at my command have enabled me to perform. It is believed that sufficient facts have now been ascertained so as to enable the department to deal with the matter at least tentatively.

It was at first intended to make this report before the proposed purchase by the United Drug Company of the Riker & Hegeman Company was consummated. The investigation was found more complicated and prolonged than was expected. Counsel for the United Company asked for an opportunity to obtain and furnish additional information before the matter should be reported to the department. It seemed to me that the Government ought to have an assurance that delay at the request of the United should not hereafter prejudice any proceedings that the Government might feel required to bring. I made this suggestion to counsel for the United Drug Company, and under date of November 30, 1915, received from Mr. Frederic E. Snow, the United's counsel, a letter reading as follows:

"Referring to your investigation in the matter of the proposed purchase by the United Drug Company of the Riker & Hegeman Company, I have not yet been able to obtain the additional information which you have asked for. I hope to be able to obtain it shortly.

"I think it is of great importance that whatever report you may make to the Department of Justice should not only state the facts correctly but should also state all the facts which may fairly be considered material to the decision of the question involved. Meetings of the stockholders of the companies interested have been called to be held in the near future, and it is possible that the delay necessitated by an attempt to get together all the material facts may make it impracticable for the department at Washington to reach a conclusion in regard to the matter before final action is taken. While I am not willing to agree to any postponement of action by the corporations involved, nevertheless I deem it so important that the facts should be fully presented that I undertake on behalf of the United Drug Company to state that it will make no claim that any delay had for the purpose of presenting the case more fully and accurately shall affect the position or rights of the Government or be argued as giving any validity to any action which may be taken by the companies in the interval."

The consolidation between the United Drug Company and the Riker & Hegeman Company therefore proceeded, pending the furnishing of the additional information sought. Pressure of other matters upon me has resulted in some further delay, but as the consolidation had already been effected I can see no possibility that this subsequent and additional delay has changed to the slightest degree the relations between the parties and the Government.

It should be noted at the outset that the great bulk of my information concerning the United Drug Company has been derived from it through its president, Louis K. Liggett, and its counsel. They have courteously and frankly furnished documents and information as I have requested. I have obtained some information from wholesale and retail druggists, and have had a few reports based upon investigations by certain members of the Bureau of Investigation. I also read and considered a report concerning a former contemplated consolidation of the Riker & Hegeman Company with the United Cigar Stores Company, made by Claude A. Thompson, Esq., a member of the force of the district attorney for the New York district.

After this report was drafted, a copy was submitted to counsel for the United for their suggestions and with an express request that such facts as are herein stated as based upon data furnished by them should be corrected or verified.

Under date of March 31, 1916, counsel have submitted a long letter, in which they say that they "have no corrections to suggest in respect of such statements in your report as appear to be clearly statements of fact as distinguished from inferences of fact or matters of opinion." Counsel further request that my report "should show to what extent your inferences and deductions are based upon facts stated in the report, and if they are based in whole or in part on other facts, information, or evidence, such facts, information, or evidence should accompany the report." To comply literally with this request would unduly lengthen this preliminary report, would tend to make an

investigation by a United States attorney altogether too much like a judicial proceeding, and would prevent the Government from using facts and inferences of fact properly obtained from sources in whole or in part confidential.

I have, however, endeavored to comply as far as practicable with the request of counsel to indicate to what extent my inferences and deductions are based upon facts other than those stated in the report by making certain insertions, bracketed in red, dealing specifically with most of the suggestions and requests contained in said letter.

Obviously, as my information has been derived in great part from the United Drug Company and its counsel, I am more likely to err in favor of their views, both in statement of facts and in inferences from facts, than if the case had originated with and the information had been largely derived from competitors and opponents of the United Drug Company.

While the occasion of this investigation was the announced consolidation of the United Drug Company with the Riker & Hegeman Company's chain of stores, the relations of the present United Company to the law cannot be seen in proper perspective without considering the history and nature of the United Drug Company's organization and business. This consolidation with the Riker & Hegeman chain of stores, although an important transaction, is but an incident in the career of the United in organizing on a large scale the drug trade not only of the United States, but to some degree of Canada and Great Britain.

Prior to 902, Louis K. Liggett, who is now president of the United Drug Company, conceived the idea of combining independent retail druggists in a manufacturing and supply enterprise. He put this idea into effect by the organization in New Jersey in 1902 of the United Drug Company. Of the original capitalization of \$300,000 common and \$200,000 preferred stock, about \$160,000 was subscribed for by about forty druggists located in various parts of the United States. Throughout the history of the enterprise, Mr. Liggett has been the executive head and is in many, if not most, respects the dominating and idea-originating personal force of the company. Among the original subscribers were the W. B. Riker & Sons Corporation, the Jaynes Drug Company, and the Bolton Drug Company, all of which were up to the time of the recent consolidation a part of the Riker & Hegeman Company.

One chief characteristic, although it is by no manner of means the whole plan, of the scheme upon which the United Company was organized is that of distributing its goods, which it has manufactured and compounded as a wholesaler, to the using public through the so-called (but mis-called) agency of a single retail druggist in each city or town who must also be a stockholder of the company. It was thus planned to make stockholders and customers synonymous terms. But it would be a grave error to assume that the plan either in design or in performance stopped at this point. The tying of the stockholder druggists to the United Company by contracts hereinafter described, the purchase and control of 163 of the best drug stores in the country, the development and advertising of the trade-marked goods called Rexall—together with other aspects of the organization hereafter set forth more in detail—make the purpose of the United Drug Company much more than a mere plan of cooperation among certain retailers to organize and run a manufacturing and jobbing wholesale house.

The United Drug Company's principal place of business is Massachusetts. It has warehouses in Chicago, St. Louis, San Francisco, and Liverpool and a branch factory in Toronto, Canada. In 1911 it was intended to reincorporate in Massachusetts and dissolve the New Jersey corporation. This plan was thwarted by a stockholder interested in the Riker & Hegeman Company, holding 120 out of 12,730 shares (see 80 Atlantic Reporter, 930), but the organization of the Massachusetts company for business was nevertheless completed and the Massachusetts corporation, until the recent consolidation, carried on (mainly as a holding company through its subsidiaries) all the manufacturing and jobbing business. The business of the United Drug Company now consists of—

1. Manufacturing and wholesaling of drugs and other articles commonly sold in drug stores to stockholders only. This point should be noted—what is called a drug store is in reality a variety or department store.
2. The conducting of the business of 163 of the largest drug stores in the country.
3. The United has also a minority interest of \$114,000 par value in the Owl Drug Company, which operates a chain of 22 drug stores in cities on the Pacific coast. The Owl Drug Company does an annual business of about \$5,000,000.

The character and extent of the business recently conducted by the United Drug Company appears from the following statement furnished by the company and covering its operations during the year ending June 30, 1915:

Drugs and patent and proprietary medicines-----	\$1,797,000
Cigars and cigarettes-----	1,558,000
Candy-----	1,199,000
Stationery-----	732,000
Toilet articles-----	592,000
Soda-----	525,000
Rubber goods-----	454,000
Spring water-----	38,000
Miscellaneous supplies-----	719,000
	<hr/>
	7,614,000

In addition to this \$7,614,000 gross business, about \$400,000 business was done with dealers in Great Britain and Canada. Of the \$7,614,000 done in the United States, \$685,000 was business done with the retail stores owned by the United Drug Company, through a subsidiary corporation called the Louis K. Liggett Company.

The United Drug Company of Massachusetts, before the recent consolidation, had an outstanding capital stock of \$8,026,350. Its chief assets were as follows:

(1) All but 120 shares of the issued capital stock of the United Drug Company of New Jersey—par preferred, \$523,000; par common, \$750,000—which is the drug manufacturing company.

(2) The entire capital stock of the Louis K. Liggett Company—par preferred, \$1,747,000; par common, \$3,125,000—which is a retailer conducting 46 retail drug stores.

(3) All the stock and bonds of the Cooperative Real Estate Company, which has an issued capital of \$163,700 in stock, and has outstanding bonds of \$600,000, and owns the real estate and manufacturing plant in Boston which is used by the manufacturing company.

(4) All of the common stock, par value, \$100,000, and \$81,000 preferred stock, being a minority of the preferred stock of the United Drug Company, Limited, which conducts the manufacturing and wholesale business in Canada.

(5) All the common stock of the par value of \$100,000 and the minority of the preferred stock \$10,000 of the Guth Chocolate Company.

(6) The entire capital stock of the National Cigar Stands Company—\$200,000 common and \$150,000 preferred—which is a jobber of cigars and cigarettes to its retail agents.

(7) The entire capital stock of the F. L. Daggett Company—\$100,000—which deals in soda-fountain supplies.

(8) The entire capital stock of the United Pharmaceutical Company.

(9) The entire common capital stock—\$25,000—of the Hanson-Jenks Company, which sells perfumes, and also the entire outstanding preferred stock, amounting to \$288,000, par value.

(10) The entire common capital stock of the Ballardvale Springs Company, which manufactures spring water, ginger ale, etc.

(11) An investment in a minority of the common and preferred stock of the Owl Drug Company, which is engaged in the retail drug business on the Pacific coast and has the exclusive selling agency in several cities for the United Drug Company.

The United Drug Company of New Jersey also owns—

(12) The entire capital stock of the United Perfume Company.

(13) The entire capital stock of the United Candy Company.

(14) The entire capital stock of the United Laboratories Company.

All the above companies, with the exception of the Guth Chocolate Company, the F. L. Daggett Company, the Ballardvale Springs Company, and the Owl Drug Company, were organized at the instance of the United Drug Company for the purpose of carrying on its business. I find nothing in the facts relative to the acquisition of the Guth Chocolate Company, the F. L. Daggett Company, and the Ballardvale Springs Company, and the Owl Drug Company, were organized at the instance of the United Drug Company for the purpose of carrying on its business. I find nothing in the facts relative to the acquisition of the Guth Chocolate Company, the F. L. Daggett Company, and the Ballardvale Springs Company calling for special comment. The ownership of a minority interest in

the Owl Drug Company probably indicates a provision for further consolidation, unless there is in the meantime an interference by the Government.

The Louis K. Liggett Company before the recent consolidation owned and operated 46 retail stores in the United States and Canada, as follows:

Massachusetts:	Stores.		Stores.
Boston.....	5	New Jersey: Paterson.....	1
Brockton.....	1		
Brookline.....	1	Rhode Island:	
Haverhill.....	2	Newport.....	1
Lawrence.....	1	Pawtucket.....	1
Lowell.....	1	Providence.....	5
Salem.....	1		
Worcester.....	1		7
	13	Ohio: Columbus.....	2
		Michigan: Detroit.....	3
New York:		Ontario: Toronto.....	2
Binghamton.....	1	Manitoba: Winnipeg.....	5
Buffalo.....	4		
New York City.....	4		
Syracuse.....	3		
Troy.....	1		
	13		

The aggregate sales of these Liggett stores for the year ending June 30, 1915, were a little under \$5,000,000, and the average something over \$100,000 a store. It is stated that the purchases of the Liggett stores were about two-thirds of the sales, and that only about twenty per cent of their purchases were from the United, the balance coming from outside wholesale drug and other supply houses. The United sells no goods to retailers not owned or controlled by it or who are not stockholders in it. As above noted, early in its career it established a line of trade-marked goods called Rexall, an unholy combination of Latin "rex," king, and English "all." These trade-marked goods are claimed to be, and very likely are, of standard, perhaps of superior, merit. They have been largely advertised by the United as well as through its stockholder customers. Obviously, as the consuming public is more and more educated into calling for Rexall goods, druggists will everywhere find it an increasing advantage or necessity to have on sale what the public calls for.

The United stockholder customers have not only had a money interest in pushing its goods but they have been tied to the United's line of goods by express contracts. Six different forms of these contracts have been submitted to me. They indicate chronologically a progressive shading toward legality, at least in form. The first form of contract made in 1903 is in abstract as follows:

The United being the manufacturer or wholesaler and the stockholder druggist the retailer, it sets forth that the United is in the business of making and selling "The Rexall remedies and other products"; that the retailer has purchased a portion of its capital stock and desires to be appointed special selling agent of the United in \_\_\_\_\_. It is further agreed—

(1) That the United appoints the retailer its special selling agent in \_\_\_\_\_ and agrees not to sell its products to any other dealer in said place so long as the retailer "shall perform the terms of this agreement."

(2) The retailer agrees to "uphold all of the products" of the United "to the full list prices" set by the United, and "further agrees never under any circumstances to sell or allow said products to be sold to the wholesale or retail dealers except at full detail prices."

(3) The retailer "further agrees to confine the sale of the products" of the United "to his own retail store and to consumers only; and for a violation of articles (2) or (3) the retailer shall pay the United "the sum of one hundred dollars as liquidated damages for each and every such violation."

(4) The agreement is to continue as long as the retailer holds the United's stock.

(5) If the retailer owns preferred stock, the United may waive the three-year redemption clause contained in the certificate, "so long as the territory controlled by" the retailer "shall prove profitable to the" United, etc.

(6) Requires the United to keep a record of advertising and other expenses charged to the retailer's territory and to credit such record with the purchases in that territory.

(7) If the retailer desires to sell his stock, he is to offer it to the United's executive committee on ten days' notice.

The next form of agency contract, covering an unascertainable period, varies chiefly from the foregoing in containing a provision that if the retailer is dissatisfied with the agency or feels that any misrepresentation has been made by the United, he may notify the United, and the United shall take his stock at par value plus seven per cent interest, less dividends received, and the United also will take back merchandise sold the retailer at cost. The provision for maintaining full retail prices and selling only in his retail store and to consumers only is still contained.

The third form covers a period from about 1907 to about 1910. Its main provisions are in substance as follows:

The retailer agrees—

(1) To use his best efforts to extend and increase the sale of Rexall remedies and other products manufactured and sold by the United in his territory; to keep goods on hand; bring same to the attention of customers; always to sell them when called for or when opportunity offers; and not to sell except to consumers only in his own store; nor to sell below the full list retail price set by the United.

(2) To carry no stock of merchandise similar to said Rexall remedies and other products manufactured and sold by the United and sold in competition to the goods of the United without giving the merchandise of the United preference in display and sale.

(3) Relates to selling stock only in accordance with the by-laws.

It is mutually agreed that the agreement may be terminated by the retailer on thirty days' notice, and shall terminate at once and without notice upon any violation by either party, and shall be terminated at the option of the United whenever the retailer "shall fail to execute the agency hereby granted in a manner satisfactory and profitable to said party of the first part." There are further provisions relative to repurchase by the United of stock and Rexall goods in case of termination of the contract.

The fourth form of contract, said to have been "first used in about 1910 to 1914," contains no express provision for the maintenance of resale prices; otherwise it seems to be substantially like the last form. It does contain the provision that the United may terminate the contract whenever the retailer fails to "execute the agency" \* \* \* In a manner satisfactory and profitable to the United.

The fifth form, said to have been used from July 22, 1914, to date (copy hereto annexed and marked "A") varies but little from the foregoing. It gives the retailer the exclusive right in the named territory to handle Rexall remedies and other products of the United. It requires the retailer to keep a stock of Rexall remedies on hand and to give the United's products "first preference in display, advertising, and sale." It leaves the United to terminate the agency whenever the retailer "shall fail to exercise the selling privileges in a manner satisfactory to said company." It prohibits the retailer, without the written assent of the company, from attempting "to sell or transfer any of the selling rights herein granted," but it provides that if the United determines to exercise its option to terminate, "the retailer may contest such termination before the arbitration committee of the company, as provided in its by-laws, it being agreed that the decision of the arbitration committee, or any majority thereof, shall be final and binding upon each of the parties." The sixth provision of this contract, relative to stripping the retailer of all Rexall insignia in case of termination of the contract, is as follows:

"It is expressly understood and agreed that the trade-mark 'Rexall' is the exclusive property of the company used in connection with the sale of its goods, and the retailer, upon the termination of this agreement, in whatever manner and for whatever cause, will at once discontinue and abandon the use of such trade-mark 'Rexall' and all other trade-marks and designations of the company, and will immediately cease to advertise or represent or designate his store as 'The Rexall Store,' and will remove permanently all Rexall signs in or about his place of business; and in the event of any failure of the retailer to remove such Rexall and other signs, the company may enter the premises of the retailer and itself remove such signs."

In Article III, section 10, of the of seven stockholders, none of wh



also seven alternates—to act as an arbitration committee. This arbitration committee is to have “the power to pass upon and determine all matters of difference between this corporation and any of its stockholders with respect to determination by the corporation of the right of any stockholder to sell the goods and products manufactured and sold by this corporation in accordance with the terms of any contract which may at the time exist between this corporation and such stockholder.”

The degree of control growing out of the relations established between the United and its retailers through these contracts and through the investment by the retailers in the stock of the United, averaging about one thousand dollars each, it is difficult to estimate with accuracy. If the determination of the case were to turn upon that point it would be necessary or advisable to have interviews with many retailers within and without the United circle, including, if possible, a reasonable number of the stockholders who have been disciplined or attempted to be disciplined. Correspondence with reference to a few cases before the grievance committee has been put before me. Most of the complaints made by the United were because of the alleged failure of the retailer to push the Rexall remedies as vigorously as was desired. Attempts were not infrequently made to compel the retailer to agree to take a named amount of Rexall remedies within a designated period. It is a fair inference from this correspondence that a retailer who has established even a fair amount of Rexall trade regards it as a pretty serious threat to his prosperity to be deprived of the so-called agency. I think this is particularly true in communities in which there are competitive stores. To take the Rexall agency away from one retailer and give it to his local competitor might easily spell ruin. The correspondence indicates that both the United and the retailer have a keen recognition of the grip that the United thus gets upon these stockholder retailers.

Counsel for the United direct my attention in connection with the foregoing paragraph to their claim—accurate, so far as I know—that the correspondence submitted covers all the cases which have come before the grievance committee. The earliest of the cases submitted in this correspondence arose in 1912, and in that case the agency was canceled by vote of the grievance committee in September, 1913. The total number of cases is comparatively few. I do not think, however, that I ought to comply with the request of counsel and attach the entire correspondence to this report. It is fair enough to add that I have now little or no evidence outside of these letters indicating just how and to what extent the United has undertaken to control its customer stockholders in the matter referred to.

But, as a partial offset to this statement, it should be observed that the natural way to exercise such control in the normal case would be through a traveling inspector or salesman and not by formal correspondence such as has been submitted to me.

The sixth paragraph of the contract now being used by the United, requiring the retailer if his selling rights should terminate to give up all Rexall signs, etc., is also of increasing importance as Rexall products become more and more called for by the consuming public under that name.

How far the United really controls prices at the present time it is not easy to ascertain. The company now issues a loose-leaf catalogue, loaned only to the store to which it is sent, which contains a description and price list of hundreds of articles produced or furnished by the United, with wholesale and suggested selling prices—in some cases, suggested minimum prices. Taking the conditions as a whole, I am not impressed that the elimination from the printed contracts with its stockholder retailers of the obligation to maintain retail prices has made any real change in price control. For all practical purposes the United exercises a dominating control over the methods under which the retailers shall market its goods. I can see no reasonable doubt if the United found any of its stockholders cutting prices to any considerable extent or selling the United's goods to others than the retailer's own customers in the usual course of trade, that it would claim that such retailer was failing “to exercise the selling privilege in a manner satisfactory to said company” and would, if necessary, undertake to terminate the contract. While the provision for arbitration might under certain circumstances be successfully invoked, it would not, in my opinion, have much present effect in lessening the economic domination over the retailer created by the United's relation to its Stockholder customers by these contracts and the other significant business facts.

Counsel for the United asks in connection with the foregoing paragraph that I state whether my inferences and deductions are based in whole or in part upon any facts other than those stated in the report. It is substantially, almost

exactly, true that this last paragraph is an inference from facts set forth in the report largely furnished by the United itself and that I have now at hand little or no evidence of the methods applied by the United in dealing with a price-cutting stockholder, but the inference that the machinery which the United has devised concerning resale prices was made to be used if use should be found necessary is an inference which I regard as irresistible.

Nor should it be overlooked that the United is increasing its stockholder retailers by several hundred a year. It is also increasing its own products both in quality and variety.

Mr. Liggett says: "We propose to have a line so that you can start a drug store out of our store." Question. "Your plan is, then, that your concern shall be able to produce enough, as you say, to stock a drug store?" Answer. "That is my ambition." Question. "And the step you are now taking is, as you hope and believe, a step in that direction?" Answer. "Yes." This last question and answer referred to the then proposed purchase of and consolidation with the Riker & Hegeman Company. In fairness it should be added that Mr. Liggett also says that there will probably be certain products so extensively advertised and pushed by other concerns that a drug store would be practically compelled to carry in stock some things not of the United's manufacture. At a later interview, Mr. Liggett undertook to modify to some degree the above statement, saying that if the United were able to supply "33½ per cent, then we would have reached the millennium. That is, as far as I can conceive of our ability to meet competition. I can not conceive anything higher than that. If, of every dollar, 33½ per cent was purchased in our plant, it would be a millennium. No one has ever reached it in a chain of stores except the Regal shoe stores."

Counsel for the United ask that I submit in connection with the last paragraph the entire transcript of Mr. Liggett's statements. This request, I think, should not be complied with. It would involve unnecessary repetition of many facts and load the report down with much immaterial and unimportant matter.

From the foregoing it will be seen that the United Drug Company before the recent consolidation was mainly a manufacturing and wholesaling concern, putting out about \$8,000,000 at wholesale to its own stockholders, besides owning a line of retail stores which was doing approximately \$5,000,000 of retail business. Probably the gross business done by its stockholders was from \$100,000,000 to \$150,000,000 a year. Indeed, in various figures, too long to be dealt with here in detail, I find reasons for thinking that \$150,000,000 a year is a low estimate of the amount of retail business done by the druggists interested in and tied to the United in the ingenious and effective fashion above sketched.

The United has now been consolidated with the Riker & Hegeman Company. The latter was a New York corporation with an issued capital stock of \$2,147,000 preferred and \$8,469,320 common. It conducted 81 retail stores, as follows:

Connecticut:		New York:	
Bridgeport.....	1	Brooklyn.....	7
Hartford.....	1	Mount Vernon.....	1
New Britain.....	1	New Rochelle.....	1
New Haven.....	2	New York.....	41
Stamford.....	1	Rochester.....	2
Waterbury.....	1	Schenectady.....	1
	7	Troy.....	1
		Utica.....	1
		White Plains.....	1
		Yonkers.....	1
			57
District of Columbia: Wash- ington.....	1		
		Pennsylvania:	
Delaware: Wilmington.....	1	Germantown.....	1
		Lancaster.....	1
New Jersey:		Liberty.....	1
Jersey City.....	1	Philadelphia.....	4
Newark.....	2	Pittsburgh.....	1
Paterson.....	2	Wilkes-Barre.....	1
Trenton.....	1		
	6		9

Riker & Hegeman Company also owned all the issued capital stock of the William B. Riker & Sons Company, which conducts one store in New York City, and of the Jaynes Drug Company, which conducts 35 stores, as follows:

Massachusetts:		Massachusetts—Continued.	
Boston	13	Springfield	3
Brockton	1	Worcester	1
Cambridge	1		
Chelsea	1		31
Fitchburg	1		
Haverhill	2	Maine:	
Holyoke	2	Bangor	1
Lawrence	1	Lewiston	1
Lowell	1	Portland	1
Lynn	1		
New Bedford	1		3
Pittsfield	1		
Salem	1	Rhode Island: Providence	1

The Riker & Hegeman Company also owned all the capital stock of the Hegeman Drug Company, Riker Laboratories (Inc.), Arly (Inc.), and V. Vivandou (Inc.). The combined annual sales of the Riker & Hegeman chain of stores were about \$15,000,000. They also did an outside wholesale business of about \$385,000 annually and manufactured about \$900,000 of goods for their own stores. Their manufacturing plant was in New York.

It will thus be seen that the Riker & Hegeman Company was a small wholesaler, doing about \$1,200,000 a year, and a large retailer, controlling a business of about \$15,000,000, whereas the United was a large wholesaler, selling about \$8,000,000 a year, with increasing capacity and ambition to use that capacity. Mr. Liggett in a letter to his stockholders, dated November 12, 1915, speaks of the consolidation as adding about \$16,000,000 volume to the United's present volume of business, and expresses the belief that after the consolidation the United will have an annual business of about \$35,000,000.

The consolidation which has now gone through has taken the form of a purchase of the property and assets of both the United Drug Company and the Riker & Hegeman Company by a new corporation organized under the laws of New York. New York was selected for reasons growing out of technicalities in the corporation law not necessary now to be discussed. There is some expectation that there may be another reorganization under a Massachusetts charter, but I do not understand that this prospective reorganization will work any material change in the business nature of the undertaking or in aspects in which the Government may be interested. The facts as to the capitalization of the new United Drug Company of New York and the issuance of its stock in exchange for the stock of the consolidated companies are as follows:

First preferred stock, 7 per cent, cumulative dividends	\$7, 500, 000
Second preferred stock, 6 per cent, noncumulative dividends	10, 000, 000
Common stock	35, 000, 000

This stock is to be distributed as follows:

First preferred stock of new company:	
To United Drug Co., preferred stockholders	2, 938, 950
To Riker & Hegeman Co., preferred stockholders	2, 147, 400
Total 7 per cent cumulative first preferred stock	5, 086, 350
Second preferred stock of new company:	
To United Drug Co., common stockholders	5, 250, 000
To Riker & Hegeman Co., common stockholders	3, 859, 000
Total 6 per cent noncumulative second preferred stock	9, 109, 000
Common stock of new company:	
To United Drug Co., common stockholders	11, 250, 000
To Riker & Hegeman Co., common stockholders	8, 800, 000
Total common stock	20, 050, 000

It will be observed that this reorganization has given to the old preferred stockholders of the United par for par of new preferred; has given the old common stockholders of the United \$225 par of common stock of the new company, plus \$100 par of noncumulative second preferred stock, or \$325 stock in the new corporation for \$100 stock in the old corporation; that the preferred stock-

holders of the Riker & Hegeman Company also get par for par of new preferred, and the common stockholders par for par of common stock with a bonus of \$44 of the 6 per cent noncumulative second preferred in addition. This results in increasing the gross capitalization of the two companies from about \$18,500,000 to about \$34,250,000. It is expected that the various stocks of the United will be listed and bought and sold on the stock exchanges or at any rate on the curb market. I have no present information of any intended public offering of any of these stocks.

Some inquiry has been made to ascertain to what degree the capitalization of the constituent companies represents actual cash or other form of reasonably sound investment, and how far it represents either earnings, hopes, aspirations, or control of the market. As to the capitalization of the United Drug Company of Massachusetts, the following memorandum is furnished me by counsel for the company:

(1) Common stock certified to be issued for cash.....	\$3,051,100	
Preferred stock certified to be issued for cash.....	3,533,000	
Total .....	6,584,100	
Less preferred stock not yet issued.....	1,162,400	
Total common and preferred stock actually issued for cash .....		\$5,421,700
(2) Common stock issued for N. J. Co. common and preferred stock.....	1,790,700	
Preferred stock issued for N. J. Co. common and preferred .....	196,400	
Total .....		1,987,100
(3) Common stock issued for other securities.....	158,200	
Preferred stock issued for other securities.....	600,950	
Total .....		759,150
		<u>8,167,950</u>

United Drug Co. of N. J. stock, acquired as above, is of the par value of:

Common .....	731,550
Preferred .....	515,000
Total par value of <sup>1</sup> .....	1,246,550

The consolidated statement is, therefore, as follows:

Mass Co. stock issued for cash.....	5,421,700
N. J. Co. stock issued for cash.....	1,386,550
Total stock issued for cash.....	6,808,250
Issued for property including securities of other subsidiary companies .....	1,359,700
Total .....	8,167,950

NOTE.—The reorganization plan refers to the outstanding capital of the Mass. Co. as—

Common .....	5,000,000
Preferred .....	2,938,950

Or a total capitalization of..... 7,938,950

Said figure is arrived at as follows:

Total issue of capital as above.....	8,167,950
Less preferred stock acquired by company and held in its treasury.....	279,500

7,888,450

Additional preferred subscribed for and payable in cash .....	50,500
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Total, as stated in plan..... 7,938,950

<sup>1</sup> Of which \$140,000 was issued

According to this memorandum a goodly proportion of the capitalization of the United Drug Company of Massachusetts was represented by actual cash invested. I have been unable to obtain, even approximately, adequate data as to the original investment in the Riker & Hegeman Company. It is stated that the issue of preferred stock amounting to \$2,147,000 represented the valuation of "the net tangible assets of the Wm. B. Riker & Sons Corporation and the Hegeman Company at the time of their amalgamation into the Riker & Hegeman Company," and that the \$5,500,000 of common stock then issued represented the good will, leaseholds, trade-marks, etc. What "net tangible assets" really means one can only guess. The fact that the consolidation gives the stockholders of the United Drug Company \$325 for \$100, whereas the stockholders of the Riker & Hegeman Company get only \$144 for \$100, indicates that the trading parties have themselves estimated that the intrinsic value of the old United Drug Company stock was more than double that of the Riker & Hegeman Company stock. It is therefore not an unfair inference that the Riker & Hegeman stock represented no very large volume of cash. Probably accuracy on this question of capitalization is not for present purposes necessary. I think it a fair inference from all the facts put before me that at least three-quarters of the capitalization of the new company, amounting to \$34,250,000, is what we commonly call "water," approximately the other quarter being cash or property actually contributed as an investment. Presumably Mr. Liggett and his associates expect to make all the new stocks of the consolidated company dividend-paying. If the succeed in this purpose and pay dividends steadily and with considerable permanency, so as to establish a market value of par for all their stocks, they will have grounded approximately \$25,000,000 upon the earning capacity of the consolidated company. How far these hopes of making \$25,000,000 are based upon expectation of business efficiency and economies and how far they are based upon expected control of the market is a point to which consideration must be given in reaching a conclusion as to whether the whole plan is or is not obnoxious to the Sherman Act. Watered capitalization is one fact which may, and frequently does, show a hoped or expected control or domination of the market. Obviously capitalization of a company offered to the investing public at approximately par values should represent one or more of three things:

- a. Cash or property at a fair valuation invested and used for capital purposes.
- b. Demonstrated efficiency and earning capacity in the open competitive market, or
- c. Such control of the market, either by legal monopoly under a patent or copyright or by the elimination of competition, as to furnish an assured profit far in excess of the normal return upon investment or accruing from business efficiency.

Undoubtedly it may be claimed, and with some foundation, that Mr. Liggett originates and imparts many improved methods of merchandising, so that his company is entitled to offer its stocks for sale, basing some prospective value under (b) upon demonstrated, or at any rate prospective, efficiency and earning capacity growing out of his force and ingenious notions. Clearly, no policy should be adopted by the Government which does not offer to business acumen, energy, and organizing capacity a just and proper reward. I should not feel warranted in saying that the new company was not as a purely business proposition entitled to capitalize something under (b).

On the other hand, the economic results of the chain-store method of merchandising have been the subject matter of a good deal of discussion, and so far as there can be said to be demonstration on an economic matter of that kind, I think it is demonstrated that the independent merchant operating with his own capital or capital obtained on his credit is a more efficient buyer and vendor of merchandise than a paid employee of a highly capitalized, elaborated chain-store system. Any prolonged discussion of the two systems of merchandising would be herein inappropriate. But I find it impossible to resist the conviction that the main source of the expected values in the United's stock is found in the domination or control of the market indicated under (c). It is earning capacity based upon control or domination or, at any rate, on influence, growing out of a combination, that I think the United is seeking to capitalize.

The United's counsel request me to report whether the inference in this last statement is based in whole or in part on any facts other than those stated in the report. In the main, the statement is an inference from facts reported, but I add here a reference to a memorandum, dated December 17, 1915, dictated by Mr. Liggett, dealing with the earnings which the new company must make

in order to pay its preferred dividends of about \$900,000, and say 6 per cent upon its common stock of about \$20,000,000, the total of the two being approximately \$2,100,000. Mr. Liggett states that he expects to do this by making net 7 per cent on \$30,000,000 of business. "Net" in this connection, of course, means an amount fairly applicable to capital charges, after an adequate allowance has been made for depreciation, including obsolescence, interest charges, taxes, bad bills, etc., besides all the ordinary operating expenses. Possibly the United may be able to do this without dominating prices, but my information is that 3 per cent is a fair average of profit in a large city department store and 5 per cent a very unusual profit. I can see no reason why the net profits in the kind of department stores that the drug stores are becoming should, without dominating control of prices, be substantially greater than in the best organized and operated large city department stores. Possibly Mr. Liggett is confused in his bookkeeping, for in the same memorandum he says, "Most investors in industrials do not consider a stock worth par unless it earns 10 per cent on its value." Assuming this to be so, then in order to make the \$20,000,000 of common stock worth par, 10 per cent or \$2,000,000 must be earned and paid on that, making the annual dividend requirements not \$2,100,000 but \$2,900,000—9½ per cent upon a "turn over" of \$30,000,000.

In this connection it may be noted that the Federal Government is assuming year by year greater responsibilities as regards the soundness of securities offered by prospectuses or advertising using the mails as a medium of communication. It is manifestly inconsistent for the Federal Government to prosecute as purveyors of fraud the promoters of a mining enterprise simply because of evidence that the mine is not of the represented value, if it is to stand by and see securities based upon control of the market offered to the investing public without reasonably indicating to that public that the Federal law does not now permit the market to be controlled as a basis of capitalization.

In this connection I ought to file a caveat to the effect that this is not to be considered as a charge of fraudulent intent on the part of any parties involved in this present promotion.

I am glad to comply with the request of counsel for the United and to add to the foregoing statement that so far as the facts are now known to me the parties to this promotion have made no misrepresentation or misstatements.

I am dealing simply with the system and the logical results of what I think is the essence of the plan, and am not to be misunderstood here as imputing any bad faith to any person involved in the plan. In my view the law against combinations in restraint of trade will never be generally respected until its application and enforcement precede the successful invitation to the investing public to buy securities based upon monopoly or dominating control.

It is stated that a majority of the stock of the old United Drug Company has always been held by its customer druggists. Mr. Liggett and a few associates have held something like thirty to forty per cent, which was, as he frankly admits, an easy control. In the new company the stock control situation is substantially changed; the retailers now own much less than a majority of the issued stock. Probably Mr. Liggett and his immediate associates, combining with the retailer stockholders, still have a majority, or at any rate a control. The probabilities are that large quantities of this stock will shortly pass into the hands of the general public. Hitherto retailers, together with promoters and managers of the United, have been the chief investors in and holders of the stock of the United. The time seems now to have come when the investing or speculating public, or both, will be largely interested in the success or failure of the United Drug Company. Manifestly, any action contemplated by the Federal Government should be taken seasonably before there is ground for the common and not illegitimate argument in favor of the moral equity accruing through the bona fide purchases for value of securities that the Government has permitted to be offered to such purchasers. If the expected basis of the selling value of these securities is, in fact, an illegal control of the market, that illegality should be demonstrated or attempted to be demonstrated while the control of the corporation and the ownership of the securities is mainly in the hands of those who are party to the methods that are in question.

To summarize, then, the new United Drug Company will have a capitalization of approximately \$35,000,000 and an annual business absolutely controlled by it of about \$35,000,000, including 163 of the best located and largest drug stores in the country. Besides that, it will have as stockholders more than 7,000 of the best druggists, constantly increasing in number, bound to the central supply house not only by interests, but by the contracts above described, and doing

in the aggregate probably \$100,000,000 to \$150,000,000 of business annually. Mr. Liggett estimates the gross business done by all the druggists of the country in all kinds of merchandise at \$500,000,000. I have had other estimates or guesses showing the aggregate to be \$750,000,000, or even \$1,000,000,000. There are probably about 45,000 licensed drug stores in the country—perhaps 50,000 stores doing some sort of drug business. Most of these stores are open from 7 in the morning until 12 at night. This gives them about double the merchandising hours that the large city department store has—probably 50 per cent more than the merchandising hours that the suburban or country dry goods or variety store has. Their licenses to sell drugs have been availed of in most of the States to free them from all limitations as to Sunday closing, and they are generally open and do perhaps their largest business on holidays. Their trade is largely local. People expect to find a drug store reasonably convenient to every considerable residential community. While they compete with each other, their competition inter sese is much less than that of the centrally located department store.

Manifestly, when people have been taught to resort to any particular store at almost all hours of all the days in the year, unusual facilities are offered in those stores to develop hitherto unfelt wants in the frequenters thereof. Hence, the tendency to make every so-called drug store really a variety or department store. There has been in recent years an enormous increase in the variety and quantity of goods sold at these stores. Always large purveyors of cigars and soda water, in recent years they have become increasingly the means of putting out toilet goods, rubber goods, stationery, cutlery, etc. Until recently most of these drug stores have been owned by individuals or firms. Men having or able to control a comparatively small amount of capital have thus in large numbers become independent merchants in this drug store line. The United has now become by far the largest single retail drug concern in the country. There are other lines of chain drug stores not unlikely to come into the same combination if the tendency is not checked by the Government. The May Drug Company of Pittsburgh, has some 10 or 12 stores; Dow, of Cincinnati, about 12; Taylor, of Louisville, 6; the Owl Drug Company, in which as already stated the United owns a minority stock, has 22; Schultz, of Denver, has 11 or 12; Riner, of Providence, 5. Most of the stores in these chains are probably stockholders in the United.

The American Druggists' Syndicate is another organization whose existence and activities have little apparent connection with the problem under discussion. Partly in deference to the views of counsel for the United, I refer to it briefly. It was organized some ten years ago and is a wholesale concern which distributes its products mainly through retail members and doctors, most of whom are stockholders in the company. Its gross assets are something like \$4,000,000; its capital stock something over \$3,000,000; it claims to have something like 22,000 members. It manufactures and sells certain druggists' supplies and asks its stockholders to order their supplies generally through it, so that it may become a cooperative purchasing agency. One of the grounds upon which it urges support of its methods is that only through such syndicates or organizations for cooperative buying can the dangerous and destructive competition of the chain stores be met. Adequate data are not now available to determine to what degree it has made the terror of chain-store competition efficient in bringing support to its own methods. Undoubtedly such organizations as the American Druggists' Syndicate do some good in educating slow-minded and untidy merchants in improved methods of merchandising. I do not now discuss whether a combination of this kind for cooperative purchasing is or is not a combination in restraint of interstate trade. The average individual stockholdings in this syndicate are obviously small. It does not undertake to give them any exclusive territorial privileges, and its stock appears to pass freely from hand to hand. The relations between it and its stockholders are therefore much looser and otherwise very different from those which obtain between the United and its stockholders. Whether the existence of such a syndicate is likely to prove a check upon the further extension of the business and domination of the United, or whether it is likely to be consolidated with it and thus facilitate a general drug trust is a question which may become material and not easy to decide. At any rate, I do not adopt the apparent contention of the counsel for the United that the existence of this syndicate somehow justifies the existence and activities of the United Drug Company. The Nyal Company, which claims to have some 13,000 retailer druggists operating under a terminable agency contract, is a somewhat similar organization.

I have made no such examination into the business activities of the American Druggists' Syndicate and the Nyal Company as warrants me in expressing an opinion as to the legality of all of their methods. But I am impressed that the existence of these great organizations, occupying in the main, and perhaps entirely, a legally open field, shows that the law does not unduly restrict the opportunity of organizations created for the development of trade and not the restraint of trade. The difficulty that I see with the United Drug Company is that while some of its methods tend to develop trade, other of its methods tend, in my opinion, unduly to restrict trade and to throw the control both of old and of newly developed trade into the hands of a single central organization controlled either by a few men or by one man only.

Except as modified by these organizations the drug business of the country has been mainly carried on by a considerable number of independent manufacturing and jobbing houses, competing actively in competitive interstate trade for the patronage of the 40,000 to 50,000 retail druggists. The largest wholesale house, dealing mainly in pharmaceuticals, is probably Parke, Davis & Company. Several others do a business running into the millions. As the drug stores become more and more variety and department stores they draw their supplies from a very large number of concerns. Stress is laid by the counsel for the defendant upon the great variety of business now done in the so-called drug stores and the small percentage that the business controlled or dominated by the United bears to the entire business in all kinds of merchandise, some small part of which is done in these drug stores. I am not impressed by this method of comparison. Of course, the United Drug Company will get nothing approaching a monopoly or domination of the stationery trade, the candy trade, the rubber goods trade—perhaps not even of the cigar trade, even if it absorbs all the existing chains of drug stores and increases its present list of 7,000 stockholder customers fivefold. But with such increase it would dominate what is commonly and fairly known as the drug trade, and dominating the drug trade, it would dominate the opportunity through drug stores to do the great volume and variety of merchandising which has in the last few years grown up around this nucleus. This is the gist of the situation.

One of the avowed purposes of the recent consolidation between the United Drug Company and the Riker & Hegeman Company was to eliminate local competition. The Liggett (that is, United) stores and the Riker & Hegeman stores were frequently found on opposite corners or close by each other on important streets, as on Washington Street in Boston, carrying on sharply competitive sales in various lines of goods, at times with considerable price cutting. These two chains have also been in sharp competition in the real estate market for the most advantageous sites. Obviously most, if not all, of this competition is intrastate. The combination, of course, stops this kind of local intrastate competition and makes the former competitors really one, both as vendors and as purchasers. But as purchasers they are in interstate commerce. To make a combination that kills off customers and unites a good share of the survivors so that now 163 of the biggest drug stores in the country purchase as a unit and give all the trade they possibly can to their wholesaler owner, affects substantially the opportunity of the ordinary wholesalers to do their admittedly interstate business in an open field.

One immediate result of this combination in Massachusetts alone has been to put under common management 16 Liggett (United) stores and 31 Jaynes (Riker & Hegeman) stores. The obvious and inevitable result of this combination is to cut off all the purchases from wholesalers other than the United of all supplies hitherto sold in interstate trade that the United can furnish. There is no doubt that the result of this last consolidation, entirely apart from the general combination of the United, has been substantially to decrease the opportunities of interstate trade hitherto open to a large number of drug manufacturing and jobbing houses.

I make this statement as a necessary inference from the facts reported. I have no reports before me indicating just what wholesaling and jobbing houses have found their trade cut off or limited by this combination.

We have this situation: The United Drug Company owns and absolutely controls a chain of 163 of the biggest drug stores in the country. It owns trade-marked and widely advertised goods, called Rexall, to call for which the public has already been considerably educated. It is increasing, not only in the drug trade, but in other lines, its manufacturing and purchasing facilities with the avowed purpose and intent of being able from its own resources to equip and maintain a well-stocked drug store. This last statement should



perhaps be modified by Mr. Liggett's later assertion, that he has no present hope or expectation of achieving that ambition because of his belief in the existence of a wide field of competitive conditions. Besides—and probably most important of all—this great central supply house is tied by interest and contract to 7,000 or more (and the numbers are likely to increase with accelerating rapidity) of the strongest and most active druggists in the country. The aggregate business therefore of the United and its affiliated and combined stockholders is probably not less than \$150,000,000 per year—about thirty per cent of Mr. Liggett's estimate of the gross business done in drug stores in the United States. Moreover, considering geographical limitations, a comparison of the business done by one concern with the business done by a widely scattered set of merchandising concerns is fallacious or of little weight.

In this connection attention is again directed to the contracts between the United and its stockholder retailers and he effect of those contracts as the Rexal remedies acquire greater popularity. Popular demand for goods which come to be called for by name increases as a result of advertising and repeated sales almost as microbes increase. Now, the United's contracts, analyzed in the light of the conditions which more and more will surround the parties to those contracts, fall but little, if any, short of requiring the stockholders to blacklist, so far as they practically may, the output of the United's competitors. The earlier contracts were manifestly illegal in form, probably illegal even before the Cayton bill. Whether the later contracts, standing alone, are illegal may be open to more question. But, taken as part of a general scheme to give to the United's stockholders an exclusive territorial opportunity to purchase and sell the United's line to retail customers only I think it reasonably plain that these arrangements are a combination in undue restraint of the interstate trade available for manufacturing and wholesaling druggists's supply houses.

While I think the conclusion in this last paragraph is fully warranted on the facts set forth in this report, it probably is true that there are some facts of minor importance and some inferences of fact not herein set forth which have led me to the conclusion stated.

I do not now enter into any detailed discussion of the law. It is enough now for me to say that even before the consolidation of the United Drug Company with the Riker & Hegeman chain of stores, its plan of organization in my view fell within the condemnation of the principle admirably stated on page 58 of the Government's brief in the Harvester case, as follows:

"The purpose of the antitrust act being as we have seen to preserve the competitive system, the answer must be that restriction of competition by a combination becomes undue when it reaches the point of interfering with or threatening interference with the normal and effective operation of the law of competition in any particular branch of trade.

There is strong support for the position that in contemplation of law that point is reached by any combination which causes competition in any given trade area to be substantially restricted; that beyond that it is but a question of the degree of harm inflicted upon the public, into which courts will not stop to inquire."

The main question may perhaps well be tested by putting two queries:

1. What advice would a careful lawyer give a client asking whether he could afford to take the risks of opening a retail drug store in one of our eastern cities where the United's chain of 163 stores is now entrenched, without connecting himself with the United as a stockholder and purchaser of their increasing supply of goods? I should certainly tell a client that he could not afford to take the risk.

It seems to me perfectly plain, assuming the United is as financially strong as it appears to be, that it can go into any community where it desires to establish its business, lease or buy and fit up a store, cut prices until it has ruined any local competitor having only small capital, and thus take possession of the field. To what degree its previous career has been marked by such price cutting and killing competition, I should not be warranted in reporting without a more detailed examination into the history of the facts than with the force at my command I have been able to make. That there have been such instances, I am convinced.

But I should not be justified in complying with the request of counsel for the United to report such facts, information, or evidence not set forth in the report as bear on this particular point. If, and in so far as, the Government's action should turn upon this point, it would not be fair either to assume that there have not been price cutting and instances of unfair competition nor

would it be fair to ground action against the United, without further investigation, upon the assumption that the Government could prove numerous instances of such methods.

I am not prepared to report that such methods of unfair and destructive competition have been a large factor in the success previously achieved by the United. Generally, the known possession of the power would be sufficient to drive any discreet owner into a sale on terms advantageous to the powerful, desiring purchaser. If a concern once gets a certain known control of a line of business the process of absorption is exceedingly easy. This is only another form of saying that only a few independently owned and operated stores buying their supplies from sources other than the United will hereafter come into this drug-store field.

2. What advice would a sound-thinking lawyer, conversant with the conditions, give a manufacturer or wholesaler of drugs, now reasonably prosperous and having a successful line of goods in general demand in the drug trade, if informed that the United was ready and willing to buy out that concern at a fair price? Clearly, the advice would be, "You had better sell out now before you are driven to the wall, for the United, with 163 big stores already owned, 7,000 and increasing numbers of stockholders bound to give its output the preference, adequate manufacturing and compounding facilities for all kinds of drugs, able to make 7,000 drug stores almost without expense an advertising medium, is perfectly able to substitute in the public mind in a short time and at moderate expense a desire for its Rexall substitute product instead of your line hitherto found available by large numbers of retail druggists." Carter's liver pills are probably no better than Jaynes' or Rexall liver pills, and the United can educate the pill takers out of their desire for Carter's by simply saying to 7,000 druggists, "When Carter's liver pills are called for, tell your customers that you have not Carter's, but have something just as good or better."

Normal, unrestrained competition is the competition in which sales depend upon (1) superiority, actual or supposed, of the article, or (2) an advantage in price, or (3) in time and place of supply, or (4) in the personal preference of the purchaser for the vendor or the vendor's selling agent. The very essence of the United's plan is a combination to create demand and enforce purchases without regard to any of the foregoing factors controlling under normal trade conditions. No concern competing by the ordinary methods, like Parke, Davis & Company and the other manufacturing supply houses, can be said to be competing on anything approximating equal terms with the United Drug Company, its chain of stores and its combination of stockholder retailers.

If, then, neither the local retailer, who is the potential purchaser in interstate trade, nor the manufacturer or wholesaler actually in interstate trade can be said to have a fair and open field, it must be because the United Drug Company is a combination in undue restraint of interstate trade.

Respectfully,

*United States Attorney.*

(Stamped in margin:) Received and noted Oct. 19, 1915. From F. E. SNOW. This agreement made this \_\_\_\_\_ day of \_\_\_\_\_, 191—, between United Drug Company, a corporation organized and existing under the laws of the State of New Jersey, party of the first part (hereinafter called "the Company"), and \_\_\_\_\_, party of the second part (hereinafter called "the Retailer"), witnesseth—

That for and in consideration of the mutual covenants and agreement hereinafter recited to be kept and performed by the parties hereto, said parties do agree as follows:

1. The Company hereby grants to the Retailer the exclusive right to handle and sell at retail within \_\_\_\_\_, but not elsewhere, Rexall Remedies and other products of the Company and agrees to supply the Retailer with such remedies and products in its regular course of business and upon the regular terms made to all other retailers to whom it sells such remedies and products.

2. The Retailer shall at all times use his best efforts and facilities to establish, maintain, and increase the sale of Rexall Remedies and the other products manufactured and sold by the Company in the territory hereby assigned to him; shall always keep on hand a stock of Rexall Remedies and other products of the Company sufficient to supply the demand therefor in his place or places of business; shall constantly bring such goods to the attention of the public; and shall always \_\_\_\_\_

offers. The Retailer shall at all times give the production of the Company first preference in display, advertising, and sale. The Retailer shall promptly pay for all goods supplied by the Company in accordance with the usual terms made by the Company.

3. This agreement may be terminated by the Retailer on giving thirty (30) days written notice to the Company and shall terminate at once and without notice upon any violation of any of the terms and conditions of this agreement by either party hereto and may be terminated at the option of the Company whenever the Retailer shall fail to exercise the selling privileges hereby granted in a manner satisfactory to said Company or shall fail to pay his indebtedness to said Company as the same becomes due according to the regular terms of payment fixed by the Company.

In the event of any change in the ownership or control of the business of the Retailer this agreement shall thereupon cease and come to an end, and the Retailer will not, without the written consent of the Company, sell or transfer, or attempt to sell or transfer, any of the selling rights herein granted.

4. If the Company shall at any time determine to exercise its option to terminate this agreement, the Retailer may contest such termination before the Arbitration Committee of the Company, as provided in its By-laws, it being agreed that the decision of the Arbitration Committee, or any majority thereof, shall be final and binding upon each of the parties.

5. Upon the termination of this agreement for any cause whatsoever the Retailer shall sell to the Company within thirty (30) days thereafter any shares of the capital stock of the Company and all Rexall Remedies and other products of the Company at prices established as follows, less all indebtedness of the Retailer to the Company.

(a) Preferred stock at its par value plus the amount of any premium paid to the Company for such stock, and common stock at its book value as provided for in the By-laws of the Company;

(b) Rexall Remedies and other products manufactured and sold by the Company which are in good order and condition at the price originally paid by the Retailer.

6. It is expressly understood and agreed that the trade-mark "Rexall" is the exclusive property of the Company used in connection with the sale of its goods, and the Retailer, upon the termination of this agreement, in whatever manner and for whatever cause will at once discontinue and abandon the use of such trade-mark "Rexall" and all other trade-marks and designations of the Company and will immediately cease to advertise or represent or designate his store as "The Rexall Store" and will remove permanently all Rexall signs in or about his place of business, and in the event of any failure of the Retailer to remove such Rexall and other signs the Company may enter the premises of the Retailer and itself remove such signs.

7. If the Retailer is a partnership or corporation, the necessary changes in the provisions of this agreement shall be considered to have been made so as to bind the members of such partnership and their heirs, executors, and administrators, and such corporation and its successors.

In witness whereof the parties hereto have executed this agreement in duplicate.

UNITED DRUG COMPANY,

By \_\_\_\_\_

By \_\_\_\_\_

Witness: \_\_\_\_\_

Space below should be filled in by applicant exactly as he desires his imprint to appear.

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 Senator WORKS. On the front of Mr. Anderson's report [Liggett Exhibit 2] it is recited that the original of this report was taken to Washington by Mr. Anderson on April 12, 1916.

Mr. LIGGETT. I would like to say there, Mr. Chairman, as long as these are going in, that they are the records presumably of stores, or are giving leases, and that was compiled by the district attorney himself and it gives a large number of addresses which may indicate

to his mind that there were 200 stores. However, you will find that my statement is correct as to the number of stores, and that the numbers in the list here cover warehouses and such corporations as are represented by numbers on two streets but where there is only one store. It has just occurred to me that that might be checked up.

Senator WORKS. We do not want to take up too much of the time of the committee going over the opinion of Messrs. Brandeis and Snow. Does that include the list of your stores?

Mr. LIGGETT. I thought that was going in; that is why I said that.

Senator WORKS. You furnished that list to your attorneys, did you?

Mr. LIGGETT. I do not think that is in Mr. Snow's list. I think rather only the cities are in his list, and I think in Mr. Anderson's list there are the lease numbers or the store numbers.

Mr. ANDERSON. I do not think that is so.

Mr. LIGGETT. You do not think it is in there?

Mr. ANDERSON. No.

Mr. LIGGETT. Well, I will say I am mistaken, then.

Senator WORKS. Whatever information as to that that was furnished—that was in the report—was furnished by you to your attorneys?

Mr. LIGGETT. Yes, sir.

Senator WORKS. And that is correct so far as you know?

Mr. LIGGETT. Yes, sir.

Senator WORKS. What was the amount of the capital stock of this merged company?

Mr. LIGGETT. Authorized or issued?

Senator WORKS. You may give us both.

Mr. LIGGETT. Fifty-two millions authorized stock and approximately thirty-five millions of issued stock.

Senator WORKS. Let me read this statement which I have here, and see whether that is substantially correct:

On February 5 the meeting of the Riker & Hegeman stockholders, which had been repeatedly postponed, was finally held and the merger was ratified, and two days later the United Drug Co. (Inc.), of New York, was organized under the laws of New York with a capital of \$53,100,000, which promptly took over all the Riker & Hegeman chains and all of the United Drug chains; and interests identified with the United Cigar Co. were conspicuous upon the board of the new United Drug Co.

Mr. LIGGETT. The last statement is incorrect.

Senator WORKS. The statement respecting the—

Mr. LIGGETT. The interests of the United Cigar Stores Co. were not represented then and are not represented now on the board of the United Drug Co. by anyone.

Senator WORKS. And that concern is controlled by this merger?

Mr. LIGGETT. Which concern?

Senator WORKS. The United Cigar Co.?

Mr. LIGGETT. No; it is not—the United Cigar Stores Co.

Senator WORKS. They have no connection?

Mr. LIGGETT. They have no connection with us whatever, either in stock ownership or representation or anything else.

Senator WORKS. And that company is not represented on the board of directors?

Mr. LIGGETT. No, sir.

Senator WORKS. Except for that, is that statement correct?

Mr. LIGGETT. Yes; so far as I can recollect.

Senator WORKS. Have you had any communication with the Department of Justice about this matter since that time?

Mr. LIGGETT. None whatever.

Senator WORKS. No proceedings have been commenced against your company?

Mr. LIGGETT. No, sir.

Senator WORKS. Have you had any information as to whether the Department of Justice is contemplating the bringing of any such action?

Mr. LIGGETT. No, sir.

Senator BORAH. That is, you have no such information?

Mr. LIGGETT. None whatever. I have not heard of it.

Senator WORKS. Have you talked with Mr. Anderson about it at all since the time you had this conversation you have already detailed?

Mr. LIGGETT. Not a serious conversation. I have met him on the golf links several times and have joked with him about it. I have never talked with him seriously about it.

Senator WORKS. You have no information as to what his frame of mind is respecting the prosecution of any proceeding against your company?

Mr. LIGGETT. I have had no information that he has changed his mind at all.

Senator WORKS. Have you talked with him at all about that matter, whether jokingly or otherwise?

Mr. LIGGETT. Well, I might say jokingly that I have inferred from his joke that he was of the same mind that he was at the time he examined me and at the time he turned in his report.

Senator WORKS. What did you understand to be his frame of mind at that time?

Mr. LIGGETT. As I stated before, that he felt that our company was unique in its construction, that it had the power of doing damage if it saw fit to use it, and it was to stop that that he felt he had a case.

Senator WORKS. He thought it might be a good trust or a bad one, according to its future conduct?

Mr. LIGGETT. Exactly. He rather likened it to the Harvester Case, in all of his conversations with me.

Senator WORKS. You understood at that time that if your company behaved itself, so far as Mr. Anderson was concerned, he would have no disposition to bring suit against it, did you not?

Mr. LIGGETT. I did not; I rather understood it to the contrary.

Senator WORKS. You rather thought suit would be brought?

Mr. LIGGETT. I rather thought if Mr. Anderson had his way that suit would be brought.

Senator WORKS. How do you reconcile that with your statement that if the company should be properly conducted it would not be a violation; in other words, that it depended on its future conduct, as I understood you?

Mr. LIGGETT. Quite correct; and that is as I view Mr. Anderson's report. That is the manner in which I view his report, that he be-

lieves that the Sherman law can be so construed that a company which might have power to do harm in the future can be stopped.

Senator WORKS. Then you understood that if your company did not oppressively use the power that resulted in the combination it would not be subject to action.

Mr. LIGGETT. No; you have misunderstood me, or else I have incorrectly stated my own mind. I never had that opinion.

Senator WORKS. I want your frame of mind on that subject.

Mr. LIGGETT. I did not have that in mind at all. I have stated it, I think, when I said that Mr. Anderson has always intended to prosecute us if he had his own way in the matter, based not upon any facts that he has been able to find in which we have violated the Sherman antitrust law but rather on the fact that we are sufficiently large in our own trade, that we are dominant, and might do damage in the future; and he believes that a corporation in such a condition as that can be stopped. That is, as I understand, his point.

Senator WORKS. Then, as I understand it, you understood Mr. Anderson's position to be that the mere fact of the merger in that form was not a violation of the Sherman law, but that it put your company in such a situation that it might, by using its power oppressively, violate the law?

Mr. LIGGETT. That is my understanding.

Senator WORKS. That was your frame of mind about it?

Mr. LIGGETT. Yes.

Senator CHILTON. Do you want to ask him anything, Senator Borah?

Senator BORAH. I have not had time to read these briefs of Mr. Snow and Mr. Brandeis, or the report of Mr. Anderson.

As I understand it, when you first talked with Mr. Anderson he was of the opinion that what you were proposing to do would be in violation of the Sherman antitrust law?

Mr. LIGGETT. I do not know that I can go that far, Senator, as to say that that was his opinion. I rather think he was looking to get information to find out if that was the case.

Senator BORAH. I understood you to say that you thought Mr. Anderson was somewhat arbitrary when you talked with him.

Mr. LIGGETT. Yes.

Senator BORAH. At that time you came to the conclusion that he was rather objecting to what you were proposing to do.

Mr. LIGGETT. That is correct.

Senator BORAH. Mr. Snow is your regular counsel?

Mr. LIGGETT. Yes.

Senator BORAH. And you authorized Mr. Snow to employ Mr. Brandeis?

Mr. LIGGETT. Yes.

Senator BORAH. Which you understood he did?

Mr. LIGGETT. Yes.

Senator BORAH. Then Mr. Snow and Mr. Brandeis wrote this opinion with reference to the question of whether or not your proposed action would be in violation of the Sherman antitrust law?

Mr. LIGGETT. Yes.

Senator BORAH. They came to the conclusion that it would not be in violation of the Sherman antitrust law?

Mr. LIGGETT. Yes.

Senator BORAH. And they presented that opinion to Mr. Anderson, and your understanding is that it did not fully convince Mr. Anderson that it would not be in violation of the Sherman antitrust law?

Mr. LIGGETT. Yes.

Senator BORAH. So that we have this condition of affairs, that Mr. Brandeis and Mr. Snow are of the opinion that it is not in violation of the law, and you are of the opinion that Mr. Anderson thinks it may be in violation of the law?

Mr. LIGGETT. Exactly.

Senator BORAH. And that Mr. Anderson still entertains that view?

Mr. LIGGETT. I think he does.

Senator BORAH. Then it results in this, that what you have done may be prosecuted as under the Sherman antitrust law?

Mr. LIGGETT. Yes.

Senator BORAH. You have no assurances that it will not be?

Mr. LIGGETT. None whatever.

Senator BORAH. I wish you would state, Mr. Liggett, as a business man, just what you had in your mind that you would gain and what advantage it would be to you to make this merger, and why you wanted to do it?

Mr. LIGGETT. Two things.

First, I might say a little personal pride in the ownership of a business that I started, which is the Riker business. I started the original development of that business from one store, by merging it with the Jaynes business in Boston, and afterwards was instrumental in merging it with the Hegeman business, although having no interest in it.

Secondly, the fact that it gained the United Drug Co., the manufacturing company, a much larger recognition of our goods in the metropolis, which is a material benefit in advertising and a material benefit in cost of production. I think that really sums the real reasons for putting it through.

Third, because I considered I was buying the business at a right price, the same as I would buy merchandise, and it looked to me as though there was a profit in it.

Senator BORAH. Do you control any articles or goods by reason of patents or copyrights, or anything of that kind?

Mr. LIGGETT. Only trade-marks.

Senator BORAH. Trade-marks.

Mr. LIGGETT. Yes; registered trade-marked goods; but we control no basic patent for manufacturing or control of production at all. We have none.

Senator BORAH. As I understand you, there are 153 retail stores controlled by this merger?

Mr. LIGGETT. Yes.

Senator BORAH. Scattered in 8 or 10 States of the Union, at least?

Mr. LIGGETT. I should think that many or more.

Senator BORAH. And your own parent company, the stockholding company, controls a sufficient amount of the stock of all the subsidiary companies to dominate those companies?

Mr. LIGGETT. Exactly. They are subsidiary companies, practically.

Senator BORAH. At any rate, you felt sufficiently safe in relying Brandeis to go ahead?

Mr. LIGGETT. Yes; but particularly on Mr. Snow.

Senator BORAH. Well, of course—

Mr. LIGGETT. Because I had consulted him for an opinion regarding the beginning of this enterprise, and I proceeded upon Mr. Snow's opinion in regard to this. That was before Mr. Brandeis came in.

Senator BORAH. Did you continue your plan just as you originally started out to do?

Mr. LIGGETT. Yes, sir.

Senator BORAH. Then the calling in of Mr. Brandeis did not change your plan or modus operandi of bringing about that merger?

Mr. LIGGETT. Yes.

Senator BORAH. He approved, in joining in this opinion, of whatever Mr. Snow had originally contemplated?

Mr. LIGGETT. Yes.

Senator BORAH. I think that is all.

Senator WORKS. Let me ask you, had Mr. Brandeis been retained further in this matter in case there should be litigation?

Mr. LIGGETT. Not that I am aware of.

Senator WORKS. What compensation was paid Mr. Brandeis for his services?

Mr. LIGGETT. I have never received a bill from him as yet.

Senator WORKS. So that you do not know?

Mr. LIGGETT. I do not know.

Senator WORKS. I think that is all, Mr. Chairman.

Senator CHILTON. I believe it is stated in the opinion some place, or in these papers, what percentage of the business generally your combination did have after it was consummated. What percentage of the retail business did it have; as much as 5 per cent?

Mr. LIGGETT. No.

Senator CHILTON. Less than 5 per cent. Do you know how that compares with some of the other large drug companies? Take, for instance, the Park & Tilford Co. Is that the name?

Mr. LIGGETT. You mean Parke, Davis & Co.?

Senator CHILTON. Yes.

Mr. LIGGETT. They are manufacturers, and not retailers.

Senator CHILTON. They are not retailers. What other large retailers are there besides this of yours?

Mr. LIGGETT. The Owl Drug Co., in California, is just on the Pacific coast.

Senator CHILTON. What percentage of the business has the Owl Drug Co.?

Mr. LIGGETT. Of the total business of the United States?

Senator CHILTON. Yes.

Mr. LIGGETT. I should not think it represented 1 per cent.

Senator CHILTON. Is it as large as yours?

Mr. LIGGETT. Oh, no. It is less than one-ninth the size of ours.

Senator BORAH. Are there other companies aside from yours which represent a larger per cent than yours in the retail business?

Mr. LIGGETT. No, sir; there are no other large retail drug businesses. By large, I mean business running in excess of a million and a half of dollars. The nearest to it that I think of is the May Stores, of Pittsburgh, who are part of our 7,000 stores, however; we have their agency. Then there



the Public Drug Co., and the Buck & Raynor chain drug stores in Chicago. They all represent a substantial business running to about \$1,000,000 each, or maybe a trifle more.

Senator WORKS. Do you control any stores on the Pacific coast at all?

Mr. LIGGETT. No, sir.

Senator WORKS. That field is covered by the Owl Co.?

Mr. LIGGETT. By the Owl Drug Co.

Senator WORKS. The Owl Drug Co.

Mr. LIGGETT. We have a small interest in the Owl Drug Co., but that was put in at the time following the earthquake in San Francisco, to assist them financially, and it has been profitable, and we left a very small interest in their business.

Senator WORKS. What territory do they cover?

Mr. LIGGETT. They cover from San Diego to Spokane, all the principal cities; the large cities, not the smaller cities. They have 22 stores, located in San Diego, Los Angeles, San Francisco, Oakland, Portland, Seattle, Spokane, and one in Sacramento.

Senator WORKS. They have no stores east of the Rocky Mountains, have they?

Mr. LIGGETT. No, sir.

Senator WORKS. You have not gone into their territory?

Mr. LIGGETT. No; we have not extended our business west of the mountains.

Senator WORKS. Nor they into yours?

Mr. LIGGETT. I do not know whether they have or not. We have heard that they were making leases in New York and Chicago.

Senator WORKS. They have no stores there?

Mr. LIGGETT. They have no established stores that I know of; only rumor.

Senator BORAH. Do I correctly understand that in the territory in which you operate you are the only firm doing business in these retail stores, in the drug business?

Mr. LIGGETT. We are the only firm?

Senator BORAH. Yes.

Mr. LIGGETT. Oh, no.

Senator BORAH. I gathered that from the remark you made. I had not gotten that idea.

Mr. LIGGETT. Oh, no.

Senator BORAH. In that particular territory. For instance, you spoke about a group of stores in New York City.

Mr. LIGGETT. That is, as I recall it, in New York and Manhattan proper we have 39 stores.

Senator BORAH. In that particular range of territory in which these stores are operated, are there other retail drug stores?

Mr. LIGGETT. About 2,500.

Senator CHILTON. To your 39?

Mr. LIGGETT. To our 39.

Senator WORKS. As I understand it, Mr. Liggett, you are the only large corporation that controls a chain of stores?

Mr. LIGGETT. That was the intention.

Senator WORKS. Yes.

Senator CHILTON. Do you know anything about the system of Dow Drug Stores in the West?

Mr. LIGGETT. In Cincinnati.

Senator CHILTON. They are found in Cincinnati entirely?

Mr. LIGGETT. Entirely. They are shareholders in our company and agents for our manufactured merchandise in Cincinnati.

Senator BORAH. Is that all, Mr. Chairman?

Senator CHILTON. I think so. That is all, Mr. Liggett, and we are very much obliged to you.

(The witness was excused.)

Mr. Snow, will you come forward?

#### TESTIMONY OF FREDERIC E. SNOW, ESQ., OF BOSTON, MASS.

Mr. Snow took the witness stand at 11.40 o'clock a. m.

Senator WORKS. Mr. Snow, without going into the details of this matter that have been covered by Mr. Liggett, will you tell us just what occurred between you and Mr. Anderson and between you and Mr. Brandeis in connection with this matter?

Mr. SNOW. Mr. Liggett telephoned me one day, apparently early in October, that a representative from Mr. Anderson's office had been out at their place of business and was making some inquiries apparently to find out whether there was about to be a violation of the Sherman law. I talked with him over the telephone and said that I thought I had better go to see Mr. Anderson myself and say to Mr. Anderson that if he wanted any facts we would give him any facts that he wanted, and I asked Mr. Liggett if there was any objection to doing that. Mr. Liggett said "no," and I went to Mr. Anderson and told him that if he wanted to investigate the United Drug Co. we would place before him any facts that he wanted. He said he would be glad to have that done, and, as the result of that, I gave him a preliminary statement on October 19 of facts in regard to the organization of and the business which was being done by the United Drug Co. and also some facts in connection with the Riker & Hege-man Co., which we were proposing to buy.

Senator WORKS. Have you that statement?

Mr. SNOW. I have it here.

Senator WORKS. You might incorporate that in the record as we go along.

Mr. SNOW. This particular one is not signed. It is a copy of the one that I furnished Mr. Anderson.

Senator WORKS. Perhaps you had better attach your signature to that.

Mr. SNOW. Well, Mr. Anderson has the original. It is barely possible that there may have been some corrections made.

Mr. ANDERSON. I perhaps may say that I think that statement is almost entirely repeated in the subsequent document which is already in. If you want it, however, there is no reason why it should not go in.

Senator WORKS. I do not want to encumber the record with un-necessaries at all.

Mr. ANDERSON. I think you will find that that document covers practically everything that preceded it. This was the process of getting at the facts and working the matter up.

Senator CHILTON. You can incorporate it if you think it is necessary.

(The document referred to was marked "Snow Exhibit No. 1," and is as follows, the large numbers in brackets indicating the page numbers of the carbon copy of the original typewritten manuscript:)

## SNOW EXHIBIT No. 1.

OCTOBER 19, 1915.

[Page 1.] The United Drug Company is incorporated under the laws of Massachusetts, and has an issued capital stock of \$2,800,000 par value of preferred and \$5,000,000 par value of common stock.

By itself or its subsidiaries it is engaged in the manufacture and sale of drugs and proprietary medicines, of confectionery, soda-fountain supplies, perfumes, and mineral waters. By itself or through its subsidiaries it also buys and sells cigars, cigarettes, rubber goods, toilet articles, stationery, photographic supplies, and a miscellaneous line of goods which it has been found can be advantageously handled through local drug stores.

With the exception of the retail business done by the so-called Liggett stores and the Owl Drug Company, hereinafter referred to, its business is wholly a wholesale and jobbing business, and is confined to the manufacture or purchase of the goods above described and their sale to the Liggett Stores, so called, and to local druggists who are stockholders of the company.

The United Drug Company owns:

All but 120 shares of the issued capital stock of the United Drug Company of New Jersey. This company conducts the drug-manufacturing business, and has an issued capital of \$523,000 par value of preferred and \$750,000 par value of common stock.

The entire capital stock of the Louis K. Liggett Company. As hereinafter specified more in detail, this company owns 46 retail drug stores, and has an issued capital of \$1,747,800 par value of preferred and \$3,125,000 par value of common stock.

[2] The entire capital stock and bonds of the Cooperative Realty Company. This company owns the real estate and manufacturing plant in Boston, and has an issued capital of \$163,700 par value of stock and \$600,000 of bonds.

All the common stock and the minority of the preferred stock of the United Drug Company, Limited, which conducts the manufacturing and wholesale business in Canada.

All the common and the minority of the preferred stock of the Guth Chocolate Company.

The entire capital stock of the National Cigar Stands Company. This company is a jobber of cigars and cigarettes, which it sells to the subsidiary companies of the United Drug Company and to its agents.

The entire capital stock of the F. L. Daggett Company, which deals in soda-fountain supplies.

The entire capital stock of the United Pharmaceutical Company.

The entire capital stock of the Hanson-Jenks Company, which sells perfumes.

The entire capital stock of the Ballardvale Springs Company. This company manufactures and sells spring water, ginger ale, etc.

An investment of about \$100,000 in the common and preferred stock of the Owl Drug Company. This latter company is engaged in the retail drug business on the Pacific coast, and has the exclusive selling agencies in several cities for the United Drug Company. The investment of the United Drug Company in its stock amounts to only a minority interest.

The United Drug Company of New Jersey owns the entire capital stock of the United Perfume Company, the United Candy Company, and the United Laboratories Company.

With the exception of the Guth Chocolate Company, the F. L. Daggett Company, the Ballardvale Springs Company, and the Owl Drug Company, all of the above companies have been organized [3] at the instance of the United Drug Company for the purpose of conducting specific departments of the company's business.

The original company was the corporation which was organized in New Jersey in 1902 under the name of the United Drug Company. The original capital stock of this company was subscribed for by some 35 retail druggists in various parts of the United States under the leadership of Louis K. Liggett, who conceived the idea of the company, and who has been its active head ever since. Among the original subscribers were the W. B. Riker & Sons Corpora-

tion, the Jaynes Drug Company, and the Bolton Drug Company, all of which are now a part of the Riker & Hegeman Company.

The underlying principle upon which the company was established, and which has been maintained up to the present time, is that of distributing its goods through the agency of a single retail druggist in each city or town, who should also be a stockholder of the company. As a result of this policy the company now has among its stockholders about 7,000 retail druggists in as many cities and towns in the United States, Canada, Great Britain, and some other countries, each of whom has the exclusive right to sell at retail the company's goods in his particular locality. These stockholders, while having the exclusive agency for the company's goods in their localities, are entirely at liberty to purchase such goods as they may desire from other manufacturers and wholesalers.

[4] In 19 it was deemed desirable to incorporate the United Drug Company as a Massachusetts corporation, partially in view of the fact that its manufacturing plant was located in Boston. This was done and the consent of all the stockholders of the United Drug Company of New Jersey with the exception of the W. B. Riker & Sons Corporation, the Jaynes Drug Company, and the Bolton Drug Company, who owned altogether 120 shares of stock, was obtained to the dissolution of the New Jersey company and the transfer of its assets to the Massachusetts corporation.

W. B. Riker & Sons Corporation and the Jaynes Drug Company opposed the dissolution of the New Jersey company and the transfer of its assets and brought a bill in equity in the New Jersey courts to enjoin it, and the Court of Appeals of New Jersey granted a permanent injunction against such dissolution and transfer of assets on the ground that it could be done only by unanimous consent. Accordingly the United Drug Company of New Jersey has been continued as an active corporation, the United Drug Company of Massachusetts owning its entire capital stock with the exception of the 120 shares owned by W. B. Riker & Sons Corporation, Jaynes Drug Company, and the Bolton Drug Company.

The United Drug Company, in addition to its main factory and warehouse in Boston, has warehouses in Chicago, St. Louis, San Francisco, and Liverpool, and a branch factory, the United Drug Company, Limited, in Toronto, Canada. This latter company simply [5] supplies United Drug Company products for sale in Canada.

In 1909 the Louis K. Liggett Company was organized for the purpose of operating retail drug stores in some of the larger cities. The Louis K. Liggett Company now owns and operates 46 retail stores in the United States and Canada as follows:

	Number of stores.		Number of stores.
Massachusetts:		New Jersey:	
Boston -----	5	Paterson -----	1
Brockton -----	1		
Brookline -----	1	Rhode Island:	
Haverhill -----	2	Newport -----	1
Lawrence -----	1	Pawtucket -----	1
Lowell -----	1	Providence -----	5
Salem -----	1		
Worcester -----	1		7
	13		
		Ohio:	
New York:		Columbus -----	2
Binghamton -----	1	Michigan:	
Buffalo -----	4	Detroit -----	3
New York City -----	4	Ontario:	
Syracuse -----	3	Toronto -----	2
Troy -----	1	Manitoba:	
	13	Winnipeg -----	5

NOTE.—The stores in Toronto and Winnipeg are conducted by subsidiary companies, known as Liggett's Limited and the Gordon Mitchell Drug Company, respectively.

The aggregate sales of the United Drug Company and its subsidiaries during the year ending June 30, 1915, exclusive of the retail business carried on by the Liggett stores, was approximately \$8,000,000. Of this, \$400,000 represented sales in Great Britain and Canada. This volume of business was divided among the various departments substantially as follows:

Soda	\$525, 000
Candy	1, 199, 000
Drugs and proprietary medicines	1, 804, 000
Rubber goods	454, 000
Toilet articles	592, 000
Stationery	732, 000
Cigars and cigarettes	1, 558, 000
Spring water	38, 000
Miscellaneous supplies	712, 000

All of the above merchandise was sold either to the Liggett stores or to retail druggists who were stockholders of the United Drug Company, and was sold under a trade name or trade-mark indicating that it was manufactured or supplied by the United Drug Company or some of its subsidiaries.

[7] Of the total sales of \$8,000,000 only \$685,000 represented sales to the Liggett stores, divided up as follows:

Soda and spring water	\$37, 000
Candy	180, 000
Drugs and proprietary medicines	135, 000
Rubber goods	26, 000
Toilet articles	57, 000
Stationery	11, 000
Cigars and cigarettes	235, 000

During the year ending June 30, 1915, the aggregate sales of all the Liggett stores was approximately \$4,873,000 odd dollars. The value of the purchases, as a rule, represent about two-thirds of the sales, so that during this period the purchases of the Liggett stores were approximately \$3,200,000, of which only \$685,000 worth was purchased from the United Drug Company and its subsidiaries. The remaining merchandise dealt in by the Liggett stores was purchased by each store independently at such places as the manager of the particular store thought it could be most advantageously obtained.

It is not possible to ascertain the volume of the sales in each department of all the Liggett stores, for the reason that the accounts in some of the stores are not kept so as to show it. A fairly accurate idea, however, may be obtained from the sales in the store in the Grand Central Terminal in New York, which for the calendar year 1914 were as follows:

[8] Soda	\$88, 000
Candy	61, 000
Cigars and cigarettes	40, 000
Photographic supplies	26, 000
Drugs	34, 000
Patent medicines	56, 000
Rubber goods	21, 000
Toilet articles	71, 000
Stationery	32, 000

In addition to the so-called "Rexall" goods, the Liggett stores carry and deal in similar articles which are manufactured and produced by other manufacturers and dealers. In other words, the Liggett stores obtain from the United Drug Company and its subsidiaries only about 20 per cent of the merchandise which they sell.

As above stated, the total sales of the United Drug Company and its subsidiaries for the year ending June 30, 1915, exclusive of the retail sales of the Liggett Company, were approximately \$8,000,000, of which \$400,000 represented sales in Canada and Great Britain and \$685,000 sales to the Liggett stores. This left something under \$7,000,000 of sales to the local druggists throughout the United States who are stockholders of the United Drug Company. Apart from the fact that these local druggists throughout the United States are stockholders of the United Drug Company, they have agreements with the United Drug Company of New Jersey, of which a copy is hereto attached.

[9] The United Drug Company has no means of knowing the amount of business done by these local druggists, as their only connection with the United Drug Company is through and to the extent that they purchase products of the United Drug Company and its subsidiaries.

#### RIKER & HEGEMAN COMPANY.

The Riker & Hegeman Company is a New York corporation with an issued capital stock of \$2,147,400 of preferred and \$8,469,620 of common. This company conducts 81 retail stores, as follows:

<b>Connecticut:</b>		<b>[10] New York:</b>	
Bridgeport.....	1	Brooklyn.....	7
Hartford.....	1	Mount Vernon.....	1
New Britain.....	1	New Rochelle.....	1
New Haven.....	2	New York.....	41
Stamford.....	1	Rochester.....	2
Waterbury.....	1	Schenectady.....	1
	<hr/>	Troy.....	1
	7	Utica.....	1
	<hr/>	White Plains.....	1
<b>District of Columbia:</b>		Yonkers.....	1
Washington.....	1		<hr/>
<b>Delaware:</b>			57
Wilmington.....	1		<hr/>
	<hr/>	<b>Pennsylvania:</b>	
<b>New Jersey:</b>		Germantown.....	1
Jersey City.....	1	Lancaster.....	1
Newark.....	2	Liberty.....	1
Paterson.....	2	Philadelphia.....	4
Trenton.....	1	Pittsburgh.....	1
	<hr/>	Wilkesbarre.....	1
	6		<hr/>
			9

Riker & Hegeman Company also owns all the issued capital stock of the William B. Riker & Sons Company, which conducts one store in New York City, and of the Jaynes Drug Company, which conducts 35 stores, as follows:

<b>Massachusetts:</b>		<b>Massachusetts—Continued.</b>	
Boston.....	13	Worcester.....	1
Brockton.....	1		<hr/>
Cambridge.....	1		31
Chelsea.....	1		<hr/>
Fitchburg.....	1	<b>[11] Maine:</b>	
Haverhill.....	2	Bangor.....	1
Holyoke.....	2	Lewiston.....	1
Lawrence.....	1	Portland.....	1
Lowell.....	1		<hr/>
Lynn.....	1		3
New Bedford.....	1		<hr/>
Pittsfield.....	1	<b>Rhode Island:</b>	
Salem.....	1	Providence.....	1
Springfield.....	3		

Riker & Hegeman Company also owns all the capital stock of Hegeman Drug Company; Riker Laboratories, Inc.; Arly, Inc.; and V. Vivaudou, Inc. The combined annual sales of the Riker & Hegeman chain of retail stores are about \$15,000,000. In addition, these Riker & Hegeman companies do an outside wholesale business of about \$385,000 annually. They also manufacture \$886,000 of goods for their own stores annually. The manufacturing plant of the Riker & Hegeman Company is located in New York.

It is proposed to consolidate the business and assets of the United Drug Company and the Riker & Hegeman Company either through the purchase by the United Drug Company of Massachusetts of all the assets and business of the Riker & Hegeman Company or the formation of a new corporation to acquire the assets and business of both companies. In either event it is proposed to eliminate, so far as possible, all the intermediate and subsidiary companies, and the

stockholders of each company will be given an opportunity to exchange their stock for stock of the consolidated company in such proportion as may be agreed upon.

[12] EFFECT OF THE PROPOSED CONSOLIDATION ON INTERSTATE COMMERCE.

The United Drug Company and its subsidiaries are presumably engaged in interstate commerce to the extent to which they sell merchandise to the Liggett stores and local druggists in other States, and the Riker & Hegeman Company is presumably in the same manner engaged in interstate commerce. In the case of the Riker & Hegeman Company the entire wholesale business is approximately \$1,200,000 a year, and of this \$886,000 represents sales to the stores which it owns. As a very large number of its own stores are located in New York State the percentage of interstate commerce done by the Riker & Hegeman Company would seem to be comparatively small.

Presumably, the Liggett stores, the local druggist who are stockholders of the United Drug Company, and the Riker & Hegeman stores are all engaged in interstate commerce in so far as they buy the merchandise which they resell at retail from parties outside the State in which they are located. There is no method of determining the amount of this business, except so far as the dealings are with the United Drug Company and its subsidiaries or with the Riker & Hegeman Company. Neither the retail business of the Liggett stores nor the local druggists who are stockholders in the United Drug Company nor of the Riker [13] & Hegeman stores would seem to have anything to do with interstate commerce.

While we have no figures as to the division of the manufacturing and wholesale business of the Riker & Hegeman Company, yet the entire business of that character done by them is only about \$1,200,000 a year and is, therefore, not of sufficient size to affect the deduction which may be drawn from comparing the wholesale business done by the United Drug Company with similar business done throughout the country.

For the year ending June 30, 1915, the total sales of drugs and proprietary medicines by the United Drug Company and its subsidiaries, not including sales at retail by the Liggett stores, were \$1,804,000. According to the statistics contained in the 13th census, taken in 1909, which is the latest information available, the estimated product at cost of patent medicines and compounds and druggists' preparations manufactured in the United States for that year was over \$127,000,000, and this amount is the estimated cost and not the wholesale price. Neither do the above figures include drugs or proprietary medicines imported from foreign countries. During the year ending June 30, 1915, the sales of candy by the United Drug Company and its subsidiaries, exclusive of the retail sales of the Liggett stores, were \$1,199,000. The estimated cost of confectionery manufactured in the United States during the year 1909 was \$134,000,000.

[14] During the year ending June 30, 1915, the total sales of cigars and cigarettes by the United Drug Company, exclusive of the sales at retail by the Liggett stores were \$1,558,000, while the estimated cost value of cigars and cigarettes manufactured in the United States during the year 1909 was \$676,000,000.

The Riker & Hegeman Company has 48 stores at the present time in Greater New York, while the United Drug Company through the Liggett Company has 4 stores in New York. Upon the consolidation the new company will own and operate 52 drug stores in Greater New York. The New York City Directory in 1912 showed that there were at that time 2,402 drug stores in the city of New York other than those owned by the Riker & Hegeman Company and by the Liggett Company.

As above stated, the sale of drugs and proprietary medicines is only a part of the business conducted by these stores, and they not only come in competition with other drug stores, but also cigar stores, confectionery stores, stationery stores, photographic supply stores, department stores, and in fact with most other retail stores.

Mr. SNOW. I might say that at this same time negotiations were going on for the completion of this so-called merger, and I advised Mr. Liggett that in my judgment they should proceed without reference to this investigation by Mr. Anderson, because I was convinced that there was no violation of the Sherman law.

On October 25, at Mr. Anderson's request, Mr. Liggett and I were present at Mr. Anderson's office, and Mr. Anderson examined Mr. Liggett at considerable length with regard to various facts which he thought were material. I have here a copy of the stenographic report of that interview, and I think Mr. Anderson has one, too.

Senator WORKS. I think, Mr. Chairman, that should go in the record.

Senator CHILTON. If any member wants it to go in, it goes in as a matter of course.

Mr. SNOW. Will we get this back?

Senator WORKS. Yes; that will be returned to you.

Senator CHILTON. We will give you a copy in print at the expense of the Government.

(The paper referred to was marked "Snow Exhibit No. 2," and is as follows, the large numbers in brackets indicating the page numbers of the carbon copy of the original typewritten manuscript:)

#### SNOW EXHIBIT No. 2.

OCTOBER 25, 1915.

[Page 1.] Interview with Louis K. Liggett, present with counsel, Frederick E. Snow, in relation to the proposed consolidation of the United Drug Co. and the Riker-Hegeman Co.

Mr. ANDERSON. Let me say at the outset that although I like to have these statements taken stenographically so that I may refer to them, I do not want any undue formality attached to that. My desire is to get at the facts and then have them in such form that I shall be able to refer to them later.

You are the head, as I understand, of the United Drug Co.?

Mr. LIGGETT. Yes.

Mr. ANDERSON. Mr. Snow has been good enough to give me a statement outlining the proposed consolidation between the United Drug Co. and the Riker-Hegeman Co., which I have not had time to read as carefully as I intended to.

Mr. LIGGETT. It is proposed to purchase the assets of the Riker-Hegeman Co.

Mr. ANDERSON. There are a good many companies involved here, but the United Drug Co., which is a Massachusetts corporation, proposes, as I now understand, to purchase the assets of the Riker-Hegeman Co.?

Ans. Yes.

I wish you would tell me what the main purpose is in this proposed consolidation or purchase.

Ans. In the first place, a more economic conduct of the business. These two businesses are duplicate overhead organizations where only one is necessary. In the retail business to-day we find our gross profit is constantly getting less and our expenses higher. This is not only true of our business, but of any business in the retail line. With one organization we can give better service [2] to the public without increasing prices. The second reason is the fact that the United Drug Co., which is a manufacturing company, requires for advertising and distributing purposes its own stores in the metropolises—stores that will radiate its products throughout the country, both by display of the United Drug Co. goods and in daily newspaper advertising. That is impossible under existing conditions. The third reason is a little personal pride on my part to acquire that business. I organized that business.

You mean the Ricker-Hegeman?

Ans. Yes. It got away from me on the question of policy.

With the last of course I have nothing to do.

Ans. You asked my reasons and I have given them.

I only meant that officially I have nothing to do with that. Do I understand that the United Drug and Riker-Hegeman are both manufacturing companies?

Ans. I do not consider the Riker-Hegeman a manufacturing concern. What they manufacture amounts to very little. A large percentage of their own products is package of articles like alcohol, witch-hazel, etc. The United Drug Co. is purely a manufacturing concern. We manufacture pharmaceutical goods, even to the finest products.



It is true, as I get it, and correct me if I am not, that both of these concerns to-day to a substantial degree put into the hands of the retailers the goods which are sold to the public through the drug stores?

Ans. Wait a minute. There is another point—whether you consider Riker a manufacturer when they produce goods for sale in their own stores. They are exactly like Filene who manufacture a few neckties to sell in their own store, but I do not consider them manufacturers. You said supply the retail stores. If you mean, do they supply other dealers; no, they do not. This is a very small business. They make only a few toilet articles. Now, the United Drug supplies 7,000 other stores.

But those are mostly stockholders?

Ans. All stockholders.

[3] Mr. ANDERSON. The United is a large drug-manufacturing concern that owns and controls a substantial line of stores and has as stockholders in it the owners of 7,000—or thereabouts—other stores?

Ans. Correct.

It puts its good into the whole line of stores, both those which it owns and controls and those which hold stock in it?

Ans. Yes.

It also sells other goods to the general drug trade?

Ans. No.

Its entire output goes to its own subsidiaries?

Ans. There is a small percentage of this production, such as candy, that does not go to our companies. This is manufactured by a subsidiary company.

But the goods manufactured by the United and its subsidiaries are put to the consuming public through its own retail stores, including in its retail stores those which hold stock in it?

Ans. Yes; over 95 per cent.

Describe the Riker-Hegeman course of business.

Ans. Primarily it is a retail company, with some \$15,000,000 of value in something over 100 stores. It carries warehouses in Boston and New York for supplying its stores in New England, New York, Pennsylvania, and Washington. They do manufacture articles for sale in their own stores, such as tooth powder, tooth paste, simple remedies, and package goods, such as alcohol, liquor, witch-hazel, sodium phosphates, and the various salts. These are put in packages and sold at a standard price, rather than have the clerks put them in packages. However, they do have a line of toilet goods under a trade name, such as perfumes, face powder, talcum powders, that they distribute throughout the United States under the name of "Vivadon"—distribute to anyone who desires to buy it. Those are products that they are advertising in the magazines and other places, but in a very limited way. I understand the volume of that business to be somewhere in the neighborhood of something less than \$150,000.

[4] Mr. ANDERSON. It is true, is it not, that at the present time the United Drug Co. stores and the Riker-Hegeman stores in several cities—at any rate in Massachusetts—exist on the same streets, perhaps only a few blocks from each other?

Ans. Yes.

And competition is pretty fierce and destructive between these rival stores?

Ans. I would not go so far as that. I would not call it destructive.

Sharp competition?

Ans. Yes.

Right up here on Washington Street there are two stores, one belonging to the United and one to Riker-Hegeman, and also near the South Station. If one store starts a sale—whatever a sale may be—on a particular line of goods, advertising it, the other store is apt to advertise the same or a competing line of goods?

Ans. Yes; the same as Jordan Marsh and R. H. White might do.

I suppose those may be taken as typical cases?

Ans. No; those exist only in Boston, Lowell, Worcester, Salem, Brockton, Providence, Brooklyn, N. Y. I would not put the New York stores in that list. In those places I have named (I will add Troy, N. Y.) I have attempted to meet what is in your mind by calling these instances typical. We have stores in competition in other cities, but only a few other than what I have named. I will have to add Paterson to that class. Those are the cities in which we have stores which are in close competition. But in other cities, like New York, we have stores in the same city not in direct competition.

The drug trade is largely a local trade?

Yes; it is largely local.

Would it not be true then that in every community in which you have two of this same line of stores in the retail section, although they might be farther [5] apart than the instance on Washington Street, there would be competition?

Ans. No; I don't think so. I will illustrate. Mr. Jaynes opened a store at the corner of Washington and Hanover Streets. He hesitated, because it might interfere with the store on Washington and Bedford Streets. At that time he also opened a store on Summer Street. He had three. He thought the one at Bedford and Washington would pull away from the others. As a matter of fact, it did for a short time; but, because he had more opportunity for advertising and other advantages, his business grew.

Were those the Jaynes yellow stores?

Ans. Yes.

Did Jaynes at that time advertise as a cut-price drug store?

Ans. Yes.

Those yellow stores were cut price, and the more there were the more they got?

Ans. Exactly. It might for a few months take away trade, but it increased later. The day has gone by when prices made business. To-day is the day of service and quality.

You don't think Mr. Jaynes's advertising cut prices increased his trade?

Ans. Materially so, as long as others maintained high prices. When I came to Boston, 18 years ago, Metcalf was the big concern. Jaynes might be called the Raymond in the drug community. Now, what he was doing was building up his trade. Metcalf maintained his old prices. Metcalf has failed. Jaynes has a prosperous business. Jaynes made his money by selling goods on a closer margin. He gave the best goods, the best quality, that anybody has ever given. He is a standard for policy.

As I get that, you say he built up his trade by cutting prices and maintaining quality?

Ans. Exactly.

And having gotten trade by cutting prices, he gradually worked prices back to a living profit?

[6] Ans. Pardon me. He made a living by a close margin of profit and ran along from 30 to 31 per cent gross profit on merchandise.

What was the usual profit?

Ans. 50 per cent.

Bought for 50 cents and sold for a dollar?

Ans. Exactly.

In that case the result was that Jaynes cut prices, put the goods to the consuming public at a less margin of profit, increased the volume, and still made money?

Ans. Yes; he decreased expenses in proportion, the percentage of rent went down, clerk hire went down.

You said a few moments ago that within a short time—I think you said within a few months—the Riker-Hegeman Company had opened a store in Troy and in Paterson?

Ans. Yes.

And have they been opening stores also in Boston?

Ans. The last store that I recall was one in South Boston, probably a year ago. I do not remember any other stores in Boston within the last year.

Have they been increasing their retail stores in other communities—about how rapidly?

Ans. I imagine they have opened an average the last three years of a dozen a year.

About how many has the United Drug Co. opened?

Ans. We have not opened more than half that number.

And during the same time has the United been increasing the number of stores that are stockholders in it?

Ans. Yes; materially.

Approximately what do you mean by "materially"?

Ans. We aim to add three or four hundred stockholders a year. We have added as high as 7,000.

[7] Mr. ANDERSON. During the last two years?

Ans. During the last 12 years.

Are there any other drug store=

Ans. Retail stores? Yes. Do you mean big stores?

Mr. ANDERSON. Yes.

Mr. LIGGETT. The May Drug Co. of Pittsburgh. They have nine or eleven. Dow, of Cincinnati, who just died and left something over \$2,000,000. She had one store ten years ago, and when she died she left 12. Taylor, of Louisville, had one store some ten years ago and now has half a dozen. The Owl Drug Co., of California, had two or three stores 10 years ago; they have 22 now.

Mr. ROGERS. Do you control the Owl stores?

Ans. No; we own stock in the company.

Are these stores that you mention confined to certain cities or States?

Ans. Certain districts.

Do they go from State to State?

Ans. The Owl is the only one which does interstate business. There is Riner, in Providence. He had one store five years ago, and he has five now in Providence. Schultz, in Denver, has 10 or 12 stores to-day.

Are those stockholders of yours?

Ans. Most of them are.

Mr. ANDERSON. These concerns that you have just named are, in the broad sense, subsidiaries of yours, in that they hold stock in your concern.

Ans. Yes. We should be subsidiaries of them in that event.

Do all those concerns you have just mentioned hold stock in your concern?

Ans. Yes.

The natural and expected result of their holding stock [8] in your company is that they will buy merchandise, as far as practicable, from your concern?

Ans. No. I wish it was so. We are more in competition with people who produce our goods than elsewhere. A competitor manufacturing a line of goods similar to what the United Drug Co. will manufacture, if he can get the endorsement of one of our large stockholders, will sacrifice all the profit on the goods he sells. We have no arrangement by which which they are compelled to buy of us. They buy of whomever they see fit. And a lot of manufacturers are just fools enough to sell goods at cost in order to get the endorsement of dealers in metropolises. That is one of the chief things with which the United Drug Co. has to contend. We cannot meet competition of that kind because we feel we are restricted. I can illustrate with the case of Huyler. A few years ago we could not buy in the leading stores any but Huyler's candy. There was an agreement with the retailer by which the retailer sold only Huyler's candy. The United Drug Co. started in business 12 years ago, and in picking the best dealers in the community to cooperate with, naturally picked a lot of men who were Huyler men. When we started in the candy manufacture we were in direct competition with Huyler. After three years of work I could get only 600 of our stockholders to sell our candy. They said, We would like to put it in, but if Huyler takes his agency away we will lose the Huyler business. I did not know how to meet that problem, until one day I thought I would spend \$100,000 in salesmen. I would hire the highest class men I could get to reason with these men. And then it occurred to me to try some advertising in magazines, so I got up a double spread ad. for the Saturday Evening Post. I got those ads. out and just about three or four weeks before they were to appear, I sent copies in colors to our stockholders, and said you don't have to buy Liggett's candy, but somebody will come into your store and ask for it. We have not caught up with the orders since. That is the way I beat Huyler.

Mr. ANDERSON. What did Huyler get for his candy then?

Ans. 60 cents. We were getting 60. No; our price was 55 cents f. o. b. Boston, or 60 cents delivered.

How much difference?

Ans. It depends on freight or express. It was in some cases to our advantage and in some not.

[9] Mr. ANDERSON. Pretty nearly the same price?

Ans. Pretty nearly.

To go back a moment. This consolidation will increase your general output to about what volume and by about what amount?

Ans. It will add to the retail business which will give us in the neighborhood of \$27,000,000 or \$28,000,000 volume. It will increase the retail business to the neighborhood of \$20,000,000 or \$21,000,000.

That is the output of the stores?

Ans. That is the output of the retail stores.

To what extent ordinarily are the retail stores stockholders in your concern—about how much?

Ans. They hold a majority.

About how much does a retail store take?

Ans. His investment will range from \$100,000 to—one holds \$100,000.

About what would be the average?

The average would be \$1,000 apiece. Wait a minute. About \$5,800,000 on the stock. On the total of \$8,100,000—

It says here seven.

Ans. I am including Canadian, Guth preferred, etc.

Does the preferred stock have a vote?

Mr. SNOW. I don't remember.

Mr. ANDERSON. Then the \$5,000,000 par value common stock has the control?

Mr. LIGGETT. Ans. All of these people do not own common stock.

But a majority of \$5,000,000 is owned by retail druggists. How large a majority?

Ans. 50 to 60 per cent.

Where is the balance owned?

Ans. Largely by myself and people associated with me. I own about 21 per cent.

[10] Mr. ANDERSON. 30 or 40 is an easy control?

Ans. If you figure control that way. As a practical matter, yes.

Without asking for a list of these names, are these people associated with you, connected with you in the administration of the business?

Ans. Not all of them. Most of them.

I suppose a list of these stockholders is available if I think I need it?

Mr. SNOW. I do not know whether any of the people associated would have objections or not.

Mr. LIGGETT. I do not know why they should.

Mr. SNOW. If the district attorney asks for it I do not know that they could find very much fault.

Mr. ANDERSON. I should be disposed to think I might ask for it.

Mr. SNOW. Don't you have to file a list at the state house? If it is filed at the state house, you can get it.

(Mr. Rogers looks it up and finds there is no such law.)

Mr. LIGGETT. We guard our stockholders very closely, to prevent competition.

I asked you some time ago about other lines of drug stores and you gave various lines of them smaller than yours and all of which, as I understood you, competing concerns that are connected with your concern by way of being stockholders in that concern?

Yes, with the exception of Riner. I presume there are more that are not connected. I do not pay much attention to things not connected with us.

Are there any large lines connected with a manufacturing concern and not connected with either of your stores?

Ans. You mean owned by some manufacturing concern. Yes; the American Drug Syndicate, much larger in membership than our own. They claim 12,000. They [11] organized as an imitation of the United Drug Co., duplicating our line of merchandise and in many cases having stockholders in its company who are stockholders in ours.

A manufacturing concern?

Ans. Yes.

Where are its headquarters?

Ans. Long Island City.

Does it own a big chain of stores?

Ans. It has one store, to my best knowledge, in New York.

What is the connection with retailers?

Ans. Their retailers are stockholders in the American Drug Syndicate.

Have you any notion of what its output is?

Ans. No. I can send you its literature. I do not even know the organization. I met the head of it only once.

The organization is a big central drug manufacturing concern, with its stock owned by a chain of stores, some 12 in number?

Ans. Yes; including doctors as well.

Is that the largest drug concern in the country?

Ans. No. Park, Davis is the largest manufacturer in the United States—of Detroit.

Do they have stores?

Ans. No.

Have you any notion how much they manufacture—the American Drug Syndicate?

Ans. I could not tell you. They are generally credited with three and a half millions?

And Park, Davis?

Ans. They manufacture in excess of nine millions.

How do they sell their goods?

Ans. To anyone who wants them. They deal in drugs and package goods.

[12] Mr. ANDERSON. That is the largest single drug-manufacturing concern in the country?

Ans. Yes; the largest in the world. They have factories in England, Russia, Australia, etc.

So far as you know, they have no connection through stock holding or ownership with their customers?

Ans. No; they sell right to the trade.

Then, as I understand you, it is true that the United Drug Co. and the Riker-Hegeman Co. are far and away the largest concerns in the drug business that put their goods out largely through their own subsidiaries?

Ans. I do not class the Riker-Hegeman Co. there at all. They are retailers. From my viewpoint I never classed them as manufacturers at all. Every retailer has to make something of his own. Riker is a manufacturer no more than the average little retailer.

What kind of a concern is Wyeth?

Ans. Same kind as Parke-Davis. They are a high-class firm.

Do they have a chain of stores?

Ans. No.

I do not understand that what I call a drug store is in any accurate sense a drug store at all, because it sells all kinds of things besides drugs.

Ans. We are busy all the time trying to find something to add to our stock.

It would be true that a drug store, as we know it to-day, is a variety store, dealing largely in what are called fancy articles?

Ans. Yes.

With Parke-Davis and Wyeth the greater part of the volume is drugs?

Ans. Confined entirely to drugs, with some toilet articles. I call tooth powder toilet goods. We manufacture candy and perfumes. We are fourth or fifth as candy manufacturers and we want to be first as perfume manufacturers, if we can. There are 26 or 28 perfume manufacturers in a large way. We do everything we can to build that up. [13] We manufacture fruit syrups for the soda fountain. We are not manufacturers of stationery in a sense. We buy paper from the paper mills and then have it cut and put in boxes. We buy direct from the mills and in that way rank very high. We are doing three quarters of a million this year. We have a very fine lot of goods. We went into the sale of hot-water bottles, syringes, etc.—all forms of rubber goods that go into a drug store. Our business in that was close to a half million. We do not manufacture those. We have them manufactured for us, because we can do that cheaper than run a factory. We propose to have a line so that you can start a drug store out of our store. By getting a large volume we can reduce our cost. That is why we want to get a larger cooperation.

You mean the Riker-Hegeman?

Ans. Yes; their retail business is three times ours.

They have a large number of stores to which they sell outright and with which they have no legal connection?

Ans. Yes. They sell to anyone who wants to buy certain of their articles.

Do most of their articles go to their own stores?

Ans. Yes.

Your plan, then, is that your concern shall be able to produce enough, as you say, to stock a drug store?

And. That is my ambition.

And the step you are now taking is as you hope and believe a step in that direction?

Ans. Yes.

And if it goes through and you then add to your manufacturing facilities so as to be able to stock your drug stores, you will have a business of manufacturing and selling of about how many millions?

Ans. About twenty-two or twenty-eight millions.

Ans. Yes.

[14] Mr. SNOW. Let me make a suggestion. Take your Liggett store on Washington St. and School St. You don't expect to supply that store with its entire stock at any time?

Ans. No.

Because you manufacture one particular thing cheaply doesn't mean they will sell only that particular kind. They will have a half dozen other brands?

Ans. Yes.

Mr. ANDERSON. I wish you would explain that.

Ans. We manufacture a talcum power. You will find that on the counters of stores and you will also find Mennen's, Williams's, Colgate's, Corylopsi's, Hudnut's, and I could enumerate probably fifty more, all retailing at the same price.

And the natural result will be the same as the competition with Huyler's candy—gradually by advertising the merit of your output and the natural interest of your stores to give preference to your manufactures, more and more of that business will become yours?

Ans. It won't. No. That is impossible because other people are going to keep on advertising.

You are going to make the public want your goods?

Ans. Yes. Naturally. I wish it was possible to carry out your suggestion, but it is not. If I did, it would be like Regal shoes. In a Regal store you can't buy anything but Regal shoes; in a Walkover store you can't buy anything but a Walkover shoe. There is no reason why we should not conduct a drug store in the same way if we want to, but it is not practical. We carry what the public want.

What dividends has the United been paying to its drug stockholders?

Ans. 8 per cent on the common; 7 per cent on the preferred.

What is the next line of increase?

Ans. What do you mean? What we will add to our manufacture?

What is the next line of approach to your ambition?

[15] Ans. I don't know. I have not anything in mind at the moment. I would like to manufacture a soda fountain.

What has become of the Soda Fountain Trust?

Ans. Like most other trusts they are not profitable. They made a large combination, but the others put a crimp in it. It was mismanaged. I only say that because we don't get a soda fountain manufactured that stands up. It strikes me there is a chance there.

What is the largest single line of output in these drug stores—the soda-water business?

Ans. It will vary. On the Pacific coast there is no soda-fountain business except in Los Angeles, which is limited.

Mr. ROGERS. Do you combine with Riker-Hegeman in controlling any drugs?

Ans. No; but there are lots of drugs which are controlled.

Mr. ANDERSON. What, for instance?

Ans. Aspirin, controlled by German patents in this country. You pay a manufacturer for aspirin 48 cents an ounce, and it don't cost a cent an ounce to manufacture.

What is it made of?

Ans. Coal tar. I could manufacture it in three months if I could get the right. Phenothalin (?) is another German product, protected by German patents. It can not be made here.

These drug stores, as a general thing, are open from seven until eleven at night?

Ans. Yes; usually eight to ten.

And they are also open Sundays?

Ans. Yes.

Is there any other line of stores open as many hours to the general public as drug stores?

Ans. Restaurants.

If you call a restaurant a store?

[16] Ans. Yes. They sell candy, cigars, and soda water.

Substantially all your stores are licensed under State law, having some druggist therein who is made responsible for the proper filling of prescriptions?

Ans. Yes.

There is no national law relative to licensing a drug store?

Ans. No.

Is there anything under the pure-food law applicable to drug stores as a whole?

Ans. No.

The Federal Government has not undertaken as yet to license even for pure drug purposes?

Ans. No. I wish they would.

The plan of consolidation is that the United Drug Co. shall buy out all the property and assets of the Riker-Hegeman Co.?

Ans. Yes.

Payment to be made by the issuance of new securities by the Riker-Hegeman Co.?

Ans. By the United Drug Co.

It is not a cash sale?

It may be in some part. We can not determine yet.

The intention is to pay by securities unless you have to pay cash?

Ans. Yes.

And how far has that consolidation now gone?

Ans. It has gone to the extent of a board meeting, authorizing the stockholders to vote on the matter.

Mr. SNOW. I do not understand that anything final has been done; they voted this morning that the meeting is to be kept open till Thursday.

Mr. ANDERSON. Who is their counsel?

Ans. Gorman Battle, I think.

At the present time nothing remains to be done to accomplish this except the stockholders' vote?

[17] Ans. As I view it. Maybe the attorneys would have a different outlook. When is this stockholders' meeting to be held?

Ans. They have not called it yet.

You said that there have been a large number of stores opened within the last few months by Riker-Hegeman. Was the fact that they are opening a large number of stores one reason why this consolidation was brought out?

Ans. No.

Mr. SNOW. I told you about our lawsuit with the Riker-Hegeman Co. Since that time the Massachusetts company has been paying unnecessary taxes to the amount of about \$30,000 a year. I have been having interviews with the president of the Liggett Co. and the president of the Riker-Hegeman Co., in which the possibility of this consolidation was discussed. The first time I knew anything about the consolidation was on account of this litigation. It was brought up a year ago by the Riker-Hegeman Co.

Mr. LIGGETT. It was brought up a year ago last February.

Mr. SNOW. The suggestions within the last year or two have always come from the Riker-Hegeman Co.

Mr. ROGERS. Have they become embarrassed?

Mr. LIGGETT. No. The reason they want to sell is that they have not an organization that knows how to run it, and they have just learned it.

Mr. ANDERSON. But they are making money?

Ans. Yes; but not enough.

What have they paid?

Ans. Nothing on the common stock lately. They paid preferred dividends, and common dividends have been passed for 18 months to my knowledge.

In the meantime they have been opening quite a number of new stores?

Ans. The reason is that those leases were made two or three years ago and those leases are now falling [18] in. They would not have done so under the present ownership because that is not their policy. They had to take over these leases.

Most of the drug-store sites in the larger towns are pretty expensive sites?

Ans. Yes, as you view it; from my point, no. The corner is the best situation and if you want to get the best corner you have got to pay the price.

Then it would be true that the rent account of a chain of drug stores would be a very large account?

Ans. It ought not to represent over 6 per cent of the volume of sales.

The rent, then, is normally about 6 per cent of the cost of distribution?

Ans. Yes.

Have you any notion of what it is in the big department stores?

Ans. About 4½ per cent; in some cases more.

That would be stores like Jordan, Marsh; Houghton & Dutton, etc.?

One natural result of this consolidation would be that such competition as is now going on down by the South Station, for instance, would be eliminated as fast as you can eliminate it?

Ans. I do not think competition would be eliminated. Both those stores are profitable stores. We could not put the business into one. Boston has no real drug store. I would like to take Shuman's corner and close those two stores and put it all into one. That is what I would like to do. It is not economical to conduct those two stores with two sets of night clerks when one would do the work.

And all these sales which are now advertised between these two lines of stores will of course stop?

Ans. There are no competitive lines of sales and never has been. For a generation the leading drug stores [19] in every city have been running a Friday or Saturday bargain sale. It is very seldom they change their prices. They have candy sales and cigar sales and numerous things of that kind. We have done that and Riker has been doing it, but they are not duplicate goods. We are too sensible to cut one another's throats.

Is there any price cutting as there was a few years ago when Jaynes opened his line of goods?

Ans. Prices have not changed.

You described Jaynes's coming into this community and cutting prices, and you said he was then regarded as the Raymond of the drug business, and he got business. Is that done now?

Ans. Houghton & Dutton sell as low as we do. So does Epstein; so does another Hebrew concern—Walker, Rintel. I am talking now about drugs. In toilet articles, every department store does it. You might buy a few articles at Jordan's a cent or two under ours. I consider the department stores our biggest competition.

Are the department stores in any way connected with you people?

Ans. Not at all.

They buy their stock of you?

Ans. No; we don't sell to them.

You mean "We won't sell to them"?

Ans. No; we won't sell to anybody but our own stockholders.

Have you any written contract with your stockholders?

Ans. Nothing but the written copy which you have.

You say that no written contracts exist with any people affiliated with you except the contract which Mr. Snow gave me the other day, which is blue or green, I don't know which, and this is what you call your contract with your stockholders?

Ans. Yes.

You don't make this with drug stores which are not stockholders?

Ans. We have with a few subagents in a few cases [20] in the larger metropolises.

And these contracts have a blank here to be filled in with the name of the territory?

Ans. Yes; city of Portland, Me., or whatever it may be.

Suppose you have three or four in the same city. They can serve anybody in that city but not elsewhere?

Ans. In the city, but not elsewhere.

So that if you had three stores in Portland, each of them would have, so far as this contract is concerned, the right to sell to anyone in Portland?

Ans. Yes.

Your stockholders, do they or do they not agree in any form of words that they will not buy products of competitors or of other people?

Ans. No.

You rely on their giving your stock preference both upon this contract and the fact that they have an interest in your sales?

Ans. Yes.

This contract provides they shall give you preference?

Ans. Of display.

Advertising as well?

Ans. Yes.

If they terminate the agreement, they are to turn back whatever Rexall remedies they have and also their stock at cost?

Ans. Yes.



Does your manufacturing concern also do a lot of general advertising of Rexall and perhaps other remedies which tends to increase the opportunity of your retailers?

Ans. Yes; we do everything we can to stimulate the demand.

[21] In what way, if at all, is pressure brought to bear on your stockholders to give you their exclusive trade?

Ans. None has ever been brought to bear on the stockholders.

Directly or indirectly, has the concern ever threatened to cut them off?

Ans. Never.

Why?

Ans. Simply because we cannot get cooperation by that method. We realize that if we attempted anything like that we would probably be coming within the law.

Mr. ROGERS. Is there any commodity which you sell and which the Riker-Hegeman Co. sells in which competition is so sharp now that with competition stopped by the combination your present selling price would be raised?

Ans. I know of none.

How about articles which you say they put up—witch-hazel and such—are you able to outsell the department stores now?

Ans. Yes; both of us are. But those articles are close margin articles which would not be affected. Those prices have been set by the department stores and not by us. We have been forced to meet the low prices set by the department stores and our consolidation would in no way affect those prices. The price of witch hazel is that price that may be advertised by Houghton & Dutton in to-morrow morning's papers.

Mr. ANDERSON. You say there is no commodity on which you two concerns are able to undersell other people so by combination you could perhaps raise the price?

Ans. I do not know how the combination would in any way affect prices. Our competition is with the department stores.

To what extent do you enforce your lowest price?

Ans. You mean the United Drug Co.? We never did enforce it.

[22] You have never found any one attempting to come under your lowest suggested price?

Ans. I think we have had two or three cases, but they are so long ago I do not remember them.

Does the Riker-Hegeman Co. get out a catalogue similar to yours?

Ans. No.

They do not suggest minimum prices?

Ans. Not that I know of.

What does Rexall mean?

Ans. King of all.

(Reading from catalogue:) "Suggested lowest retail price, 25 cents?"

Ans. The object of those retail prices is to prevent those articles being sold at a price that will discredit the quality of the goods.

Your company issues a catalogue which everyone of your customers has the loan of?

Ans. Yes.

And this is returned when they cease to be your customers?

Ans. That is something new—that catalogue. We have always had a printed and bound catalogue. That is a loose leaf. That was the ideal of that catalogue. By the time the old ones got off the press they were antiquated. What you refer to is intended to be the binder and not the contents.

(To Mr. Snow:) Have you any questions?

Ans. No. I have some additional information. In that statement the other day I attempted to state the number of other drug stores in New York in comparison with those of the United Drug Co. and the Riker-Hegeman Co. I have since got some information as to the number of drug stores in Boston, the number of stores doing a cigar and tobacco business and the number of combination stores, all of which come in competition with these. It is simply cumulative, that is all. The difficulty is that even after all it is probably only comparatively correct. It is almost impossible to be accurate on it.

Mr. SNOW. At the conclusion of that interview Mr. Anderson indicated quite clearly that he felt that there was considerable violation of the Sherman law, I think, basing it more particularly upon

the organization of the United Drug Co. and its relation to the various retail druggists in the country than on the merger itself. I did not understand that he regarded the proposed merger with the Riker & Hegeman Co. itself as being so serious as what he called the general organization of the United Drug Co. As Mr. Liggett and I left the office, Mr. Liggett expressed himself quite forcibly about the attitude of Mr. Anderson, and I said—

Senator CHILTON. For the sake of the golf game, you need not tell what that was.

Mr. SNOW. I said that, notwithstanding what Mr. Anderson had said, I was still clearly of the opinion that there was no violation of the Sherman law, and I did not believe that the court would ever hold so, and I found no reason for stopping the proceedings which were then in progress with regard to the proposed merger; that, however, he was acting on my advice and it was a matter of very considerable importance to him and his associates; that I had always, perhaps, represented corporate interests in matters of this kind, and it was barely possible that I might be prejudiced on that account; and in view of the importance of this thing I should be glad to get the opinion of somebody else who might look at it from a different view from what I had, and see whether my opinion was confirmed. He asked me whom I would like to consult, and I said I would rather have Mr. Brandeis's opinion on this thing than anybody's else.

Senator WORKS. Tell us why you desired the opinion of Mr. Brandeis in preference to that of others.

Mr. SNOW. In the first place, of course, I have known Mr. Brandeis for a great many years. As a rule, he has been opposed to me in most things in Boston where we have come together, and so I knew that he looked upon a great many things from a different point of view from what I did. I also knew that in connection with matters of this kind he had acted more or less in the public interest and had looked upon these matters from the standpoint of the public interest; and if he should be satisfied that we were not violating the Sherman law I felt that his opinion would be more valuable to me than to get the opinion, of, perhaps, some well-known corporation lawyers who were acting for corporations.

Senator WORKS. Did you know what the attitude of Mr. Brandeis was at that time toward the chain of stores?

Mr. SNOW. No; I did not.

Senator WORKS. Had you ever talked to him about it?

Mr. SNOW. Never.

Senator WORKS. You had had no litigation in which he was against you involving that question?

Mr. SNOW. No; I never had any conference with him in regard to the Sherman law or what it covered, except that some time previously I had been asked to give an opinion in connection with leases of the United Shoe Machinery Co. as counsel for Mr. Henry B. Endicott; and Mr. Jones, who was Mr. Brandeis's client, also asked Mr. Brandeis for his opinion. Before giving Mr. Endicott my opinion I conferred with Mr. Brandeis as to what opinion he was going to give Mr. Jones. That is the only time I had any conference with him in regard to any phase of the Sherman law.

Senator WORKS. I asked that because you intimated that he had been opposed to you in certain matters.

Mr. SNOW. Yes; he had; but not in connection with the Sherman law. I submitted the same facts to Mr. Brandeis that had been submitted to Mr. Anderson, and he advised me that in his opinion there was no violation of the Sherman law.

The next thing that occurred was on November 26. Mr. Anderson had stated that he was about to prepare, or had prepared, a draft of the report to send to Washington. He had told me that no action would be taken until the matter had been taken to Washington and they had passed upon the question; that he had no authority to take any action. I said that in view of the fact that we had submitted the facts to him I thought it was only fair that I should see the draft before it was sent to Washington.

On November 26 he sent me a draft report, which was a preliminary report. Going over it, it seemed to me that he had made errors in the statements, and a good many facts were omitted which I believed to be material. I then went and saw Mr. Brandeis and showed him this draft report and told him how I felt about it. I suppose I am at liberty to state these things. He agreed with me. I said, "I do not know exactly what to do about this." I said at that time, and had said before, that Mr. Anderson had taken a slant, and I had known him a great many years, and I had not the slightest idea that anybody could change his opinion after he once got started. He said, however, that he thought we ought to prepare a statement and submit it to Mr. Anderson, pointing out such facts as we thought were material and effective where they had been omitted from Mr. Anderson's statement, and where we thought the facts were different from what he had stated, and also calling his attention to our views of the law.

Senator WORKS. Was that after this report?

Mr. SNOW. This was after the report of November 26.

Senator WORKS. That was after you and Mr. Brandeis, I mean, had made your statement of your views of the law?

Mr. SNOW. No.

Senator WORKS. That was before that, was it?

Mr. SNOW. That was before. This statement of December 16 was after. It came as a result of this.

We together prepared a statement which was shown to Mr. Anderson and which has already been put in evidence, stating the facts which we believed were material and our views as to the law. That was sent to Mr. Anderson on December 16. In the meantime, I should say some time in November, it looked as if the merger proceedings might be completed at most any time, and Mr. Anderson was anxious to get his report to Washington for fear we might take the position that the merger having been completed without any action on the part of Washington the Government would be estopped. I told Mr. Anderson that I did not think it was fair for him to send in his report in its preliminary form, because I did not think it stated all the facts or stated some of the facts correctly, and I was so anxious that the facts should be stated correctly that I would agree, on behalf of the United Drug Co., to the mere fact that we had completed the merger. I wrote him a letter to that effect, and

he said, "I will let you take such time as you need." I notified him that we should proceed to complete the merger at the earliest possible moment. So that the next thing that happened was this: As I say, our letter to him under date of December 16—

Senator WORKS. I think we had better have that report incorporated in the record.

Mr. SNOW. This is a preliminary report of November 26.

Senator WORKS. That is not included in your final report?

Mr. SNOW. In the final report it is stated somewhat.

(The report of Nov. 26, 1915, was marked "Snow Exhibit No. 3," and is as follows, the large figures in brackets indicating the page numbers of the original typewritten manuscript:)

SNOW EXHIBIT No. 3.

[Page 1.]

Address reply to "The United States Attorney" and refer to initials.

A/S

Address reply to 85 Devonshire Street, Rooms 904-906.

DEPARTMENT OF JUSTICE,  
UNITED STATES ATTORNEY'S OFFICE,  
DISTRICT OF MASSACHUSETTS,  
*Federal Building, Boston, November 26, 1915.*

The ATTORNEY GENERAL,  
*Washington, D. C.*

SIR: In the matter of the proposed consolidation of the United Drug Company with the Riker & Hegeman Company.

Referring to the above matter and to Mr. Todd's letter of September 28, 1915, I have to say that a special meeting of the stockholders of the United Drug Company is called to be held on December 3, 1915, to deal with the question of the proposed consolidation. Under these circumstances it seems to me that I ought now to make a report of the *available* facts, with some observations thereon, for the purpose of enabling the department, if it deems wise, to indicate its attitude before the holding of this meeting. It is hardly necessary to say that the time and forces at my command have not enabled me to ascertain and report "all the facts" which are pertinent to the question of the legality or illegality of the proposed consolidation.

At the outset it should be noted that nearly all the information I have has been derived from President Liggett, of the United Drug Company, and the counsel for the company, and from papers furnished by them. I have had a few interviews [2] with some independent wholesale and retail druggists. Some collateral information was derived from the report made concerning a former contemplated consolidation of the Riker & Hegeman Company with the United Cigar Stores Company, by Claude A. Thompson, Esq., of the New York district.

Deriving my information mainly from the United Drug Company and its able counsel, I am more likely to err in favor of their views, both in statement of facts and in inferences of fact than if the case had originated with and the information had been largely derived from competitors and opponents of the United Company.

The proposed consolidation of the United with the Riker & Hegeman chain of stores can not be viewed in proper perspective without first seeing in outline the nature and extent of the United Drug Company's present organization and business. In fact, as hereafter will appear more clearly, while the proposed acquisition by the United Drug Company of the Riker & Hegeman chain of stores is an important transaction, it is but one of many steps taken by the United Drug Company under the dominating influence of Louis K. Liggett, its originator and president, in organizing on a large scale the drug trade not only of this country, but to some degree of Canada and Great Britain.

The United Drug Company was organized in New Jersey in 1902. The original capitalization was \$300,000 common and \$200,000 preferred, of which \$140,000 of the common was subscribed for by some 35 retail druggists in various parts of the [3] United States, under the leadership of Louis K.

Liggett, who conceived the idea of the company and who has been its active head ever since. Among the original subscribers were the W. B. Riker & Sons Corporation, the Jaynes Drug Company, and the Bolton Drug Company, all of which are now a part of the Riker & Hegeman Company.

The underlying principle upon which the company was established, and which has been maintained up to the present time, is that of distributing its goods through the so-called agency of a single retail druggist in each city or town, who should also be a stockholder of the company. In some of the larger cities there are now several such stockholder-retailers. Starting in 1902 with the subscriptions of thirty-five original retail druggists, amounting to about \$140,000 of the common stock, the enterprise has now developed until there are over 7,000 retail druggists in this country and abroad, but mostly in this country—all stockholders of the United Drug Company.

In 1911 a Massachusetts charter was taken out for the United Drug Company, and it was intended to transfer all the business to this corporation, but because of the opposition of the W. B. Riker Company, the Jaynes Drug Company, and the Bolton Drug Company, owning together 120 shares of stock, it was found impracticable to dissolve the New Jersey company, which has accordingly been kept alive and been compelled to pay some \$30,000 a year in taxes. It is said, and I credit the claim, that one [4] minor reason for the present proposed consolidation is to get rid of this opposition, effect complete transfer of the business to the Massachusetts corporation, and save taxes which ought not in business and in sound ethics to be now paid. For most purposes of this report the existence of the two corporations may be ignored.

The Massachusetts corporation has an issued capital stock of substantially \$2,800,000 par of preferred, and \$5,000,000 par of common. It is mainly a holding company, its chief holdings being as follows:

1. All but 120 shares of the issued capital stock of the United Drug Company of New Jersey—\$523,000 par of preferred and \$750,000 par of common.

2. The entire capital stock of the Louis K. Liggett Company—\$1,747,000 par of preferred and \$3,125,000 par of common. This company owns forty-six retail drug stores.

3. The entire capital stock and bonds of the Cooperative Realty Company. This company owns the real estate and manufacturing plant in Boston, and has an issued capital of \$163,700, par value, of stock and \$600,000 of bonds.

4. All the common stock and the minority of the preferred stock of the United Drug Company, Limited, which conducts the manufacturing and wholesale business in Canada.

5. All the common and the minority of the preferred stock of the Guth Chocolate Company.

6. The entire capital stock of the National Cigar Stands Company. This company is a jobber of cigars and cigarettes which it sells to the subsidiary companies of the United Drug Company and to its agents.

7. The entire capital stock of the F. L. Daggett Company, which deals in soda-fountain supplies.

8. The entire capital stock of the United Pharmaceutical Company.

9. The entire capital stock of the Hanson-Jenks Company, [5] which sells perfumes.

10. The entire common capital stock of the Ballardvale Springs Company. This company manufactures and sells spring water, ginger ale, etc.

11. An investment of about \$100,000 in the common and preferred stock of the Owl Drug Company. This latter company is engaged in the retail drug business on the Pacific coast, and has the exclusive selling agencies in several cities for the United Drug Company. The investment of the United Drug Company in its stock amounts to only a minority interest.

12. The United Drug Company of New Jersey owns the entire capital stock of the United Perfume Company, the United Candy Company, and the United Laboratories Company.

All the above companies, with the exception of the Guth Chocolate Company, the F. L. Daggett Company, the Ballardvale Springs Company, and the Owl Drug Company, were organized at the instance of the United Drug Company for the purpose of carrying on its business. On my present information there is nothing in the acquisition of the Guth Chocolate Company, the F. L. Daggett Company, and the Ballardvale Springs Company calling for special comment. The Owl Drug Company, in which the United owns a minor interest, has another large chain of stores, and the investment in the stock of that company probably

indicates a prevision of further consolidation, unless that sort of career is stopped by the Government.

The United Drug Company, in addition to its main factory and warehouse in Boston, has warehouses in Chicago, St. Louis, San Francisco, and Liverpool; also a branch factory in Toronto, Canada.

The United's largest subsidiary, the Louis K. Liggett [6] Company, was organized in 1909 for the purpose of operating retail drug stores in some of the larger cities. It now owns and operates forty-six retail stores in the United States and Canada, as follows:

Massachusetts:	Number of stores.	New Jersey:	Number of stores.
Boston-----	5	Paterson-----	1
Brockton-----	1		
Brookline-----	1	Rhode Island:	
Haverhill-----	2	Newport-----	1
Lawrence-----	1	Pawtucket-----	1
Lowell-----	1	Providence-----	5
Salem-----	1		
Worcester-----	1		7
	13	Ohio:	
		Columbus-----	2
		Michigan:	
New York:		Detroit-----	3
Binghamton-----	1	Ontario:	
Buffalo-----	4	Toronto-----	2
New York City-----	4	Manitoba:	
Syracuse-----	3	Winnipeg-----	5
Troy-----	1		
	13		

The aggregate sales of the United Drug Company and its [7] subsidiaries during the year ending June 30, 1915, exclusive of the retail business carried on by the Liggett stores, was approximately \$8,000,000, of which about \$400,000 was in Great Britain and Canada, and about \$685,000 sales to the Liggett stores. The aggregate sales of all the Liggett stores during the same period was a little under \$5,000,000—an average of something over \$100,000 a store. It is stated that the purchases of the Liggett stores were about two-thirds of the sales, and that only about twenty per cent of their purchases were from the United. The United sells no goods to retailers not owned or controlled by it or who are not stockholders in it.

The United has sought to build up its business not only by making its stockholders its selling agents, having thus a money interest in pushing its goods, but by tying them to its line of goods by express contracts. Six different forms of contracts have been submitted to me, indicating a progressive shading toward legality. The first form of contract made in 1903 may be abstracted as follows:

The United being the manufacturer or wholesaler, and the stockholder druggist the retailer, it sets forth that the United is in the business of making and selling "The Rexall remedies and other products"; that the retailer has purchased a portion of its capital stock and desires to be appointed special selling agent of the United in ——. It is further agreed (1) that the United appoints the retailer its special selling agent in — and agrees not to sell its products to any other dealer in said place [8] so long as the retailer "shall perform the terms of this agreement." (2) The retailer agrees to "uphold all of the products" of the United "to the full list prices" set by the United, and "further agrees never under any circumstances to sell or allow said products to be sold to the wholesale or retail dealers except at full retail prices." (3) The retailer "further agrees to confine the sale of the products" of the United "to his own retail store and to consumers only; and for a violation of articles (2) or (3) the retailer shall pay the United "the sum of one hundred dollars as liquidated damages for each and every such violation." (4) The agreement is to continue so long as the retailer holds the United's stock. (5) If the retailer owns preferred stock, the United may waive the three-year redemption clause contained in the certificate, "so long as the territory controlled by" the retailer "shall prove profitable to the" United, etc. (6) Requires the United to keep a record of advertising and other expenses charged to the retailer's

territory, and to credit such record with the purchases in that territory. (7) If the retailer desires to sell his stock, he is to offer it to the United's executive committee on ten days' notice.

The next form of agency contract, covering an unascertainable period, varies chiefly from the foregoing in containing a provision that if the retailer is dissatisfied with the agency or feels that any misrepresentation has been made by the United he may notify the United, and the United shall take his [9] stock at par value, plus seven per cent interest, less dividends received, and the United also will take back merchandise sold the retailer at cost. The provision for maintaining full retail prices and selling only in his retail store and to consumers only is still contained.

The third form covers a period from about 1907 to about 1910. Its main provisions are, in substance, as follows:

The retailer agrees (1) to use his best efforts to extend and increase the sale of Rexall remedies and other products manufactured and sold by the United in his territory; to keep goods on hand; bring the same to the attention of customers; always to sell them when called for or when opportunity offers; and not to sell except to consumers only in his own store nor to sell below the full list retail price set by the United.

(2) To carry no stock of merchandise similar to said Rexall remedies and other products manufactured and sold by the United and sold in competition to the goods of the United without giving the merchandise of the United preference in display and sale.

(3) Relates to selling stock only in accordance with the by-laws.

It is mutually agreed that the agreement may be terminated by the retailer on 30 days' notice, and shall terminate at once and without notice upon any violation by either party, and shall be terminated, at the option of the United, whenever the retailer "shall fail to execute the agency hereby granted in a manner satisfactory and profitable to said party of the first part." There are further provisions relative to repurchase by the United of stock and Rexall goods in case of termination of the contract.

The fourth form of contract, said to have been "first used in about 1910 to 1914," contains no express provision for the maintenance of resale prices; otherwise it seems to be substantially like the last form. It does contain the provision [10] that the United may terminate the contract whenever the retailer fails to "execute the agency \* \* \* in a manner satisfactory and profitable" to the United.

The fifth form, said to have been used from July 22, 1914, to date (copy hereto annexed and marked "A") varies but little from the foregoing. It gives the retailer the exclusive right in the named territory to handle Rexall remedies and other products of the United. It requires the retailer to keep a stock of Rexall remedies on hand and to give the United's products "first preference in display, advertising, and sale." It leaves the United to terminate the agency whenever the retailer "shall fail to exercise the selling privileges in a manner satisfactory to said company." It prohibits the retailer, without the written assent of the company, from attempting "to sell or transfer any of the selling rights herein granted," but it provides that if the United determines to exercise its option to terminate, "the retailer may contest such termination before the arbitration committee of the company, as provided in its by-laws, it being agreed that the decision of the arbitration committee, or any majority thereof, shall be final and binding upon each of the parties." The sixth provision of this contract, relative to stripping the retailer of all Rexall insignia in case of termination of the contract is as follows:

"It is expressly understood and agreed that the trade-mark 'Rexall' is the exclusive property of the company used in connection with the sale of its goods, and the retailer, upon the termination of this agreement, in whatever manner [11] and for whatever cause, will at once discontinue and abandon the use of such trade-mark 'Rexall' and all other trade-marks and designations of the company, and will immediately cease to advertise or represent or designate his store as 'The Rexall Store,' and will remove permanently all Rexall signs in or about his place of business; and in the event of any failure of the retailer to remove such Rexall and other signs, the Company may enter the premises of the retailer and itself remove such signs."

In Article III, section 10, of the by-laws is a provision for the annual election of seven stockholders, none of whom are directors or officers of the corporation—also seven alternates—to act as an arbitration committee. This arbitration committee is to have "the power to pass upon and determine all matters

of difference between this corporation and any of its stockholders with respect to determination by the corporation of the right of any stockholder to sell the goods and products manufactured and sold by this corporation in accordance with the terms of any contract which may at the time exist between this corporation and such stockholder."

The exact effect of the relations established between the United and its retailers through these contracts and through the investment by the retailers in the stock of the United, averaging about one thousand dollars each, it is difficult to estimate with accuracy. If the determination of the case were to turn upon that point, it would be necessary or advisable to have interviews with many retailers within and without the United circle, including, if possible, a reasonable number of the stockholders who have been disciplined or attempted to be disciplined. [12] Correspondence with reference to a few cases before the grievance committee has been put before me. Most of the complaints made by the United were because of the alleged failure of the retailer to push the Rexall remedies as vigorously as was desired. Attempts were not infrequently made to compel the retailer to agree to take a named amount of Rexall remedies within a designated period. It is a fair inference from this correspondence that a retailer who has once established even a fair amount of Rexall trade regards it as a pretty serious threat to his prosperity to be deprived of the so-called agency. I think this is particularly true in communities in which there are competitive stores. To take the Rexall agency away from one retailer and give it to his local competitor might easily spell ruin. The correspondence indicates that both the United and the retailer have a keen recognition of the grip that the United thus gets upon these stockholder retailers.

It should be borne in mind that the United has established and extensively advertised its so-called Rexall remedies, and especially through general and local advertising has created an increasing public demand therefor. Obviously, as public demand increases, for a druggist to be unable to supply those remedies is progressively to lessen his business. It put him more and more in a position similar to what he would be in if unable to purchase for sale such products in general use as Carter's Little Liver Pills, Wyeth's Malt, Hood's Sarsaparilla, and other generally demanded drugs and compounds.

In this connection attention is directed to the sixth [13] paragraph of the outstanding contract, requiring the retailer if his so-called agency is terminated to give up all Rexall signs, etc.

The United now issues a loose-leaf catalogue, loaned only to the store to which it is sent, containing a description and price list of hundreds of articles produced by it, with wholesale and suggested selling prices—in some cases suggested minimum prices. Under all the surrounding conditions, I think the fact that the United has eliminated from its printed contracts with its stockholder-retailers the obligation to maintain retail prices is of little or no moment. For all practical purposes the United still controls the methods under which the retailers shall market its goods. There can be no reasonable doubt that if the United found any of its stockholders cutting prices to any considerable extent or selling its goods to others than the retailer's own customers in the usual course of trade, it would claim that the retailer was failing "to exercise the selling privilege in a manner satisfactory to said company," and would undertake to terminate the contract; nor do I think that the provision for arbitration would have any practicable effect to prevent the United from dominating the situation. This is an inference which might be denied, but I think it is a fair inference from the course of business, so far as I have been able to learn that course of business.

The United is increasing its stockholder-retailers by [14] several hundred a year. It is also rapidly increasing its own products, both in quantity and variety. Mr. Liggett states, "We propose to have a line so that you can start a drug store out of our store." Question: "Your plan is, then, that your concern shall be able to produce enough, as you say, to stock a drug store?" Answer: "That is my ambition." Question: "And the step you are now taking is as you hope and believe a step in that direction?" Answer: "Yes." He also does say that there will probably be certain products so extensively advertised and pushed by other concerns that a drug store will be practically compelled to carry some things not of the United's manufacture.

There are about 45,000 licensed drug stores in the United States and possibly four or five thousand more selling drugs without licenses. Mr. Liggett estimates the gross business as upwards of \$500,000,000; other estimates put it at \$750,000,000 to \$1,000,000,000. Mr. Liggett "guesses" that the business done by the United's 7,000 stockholders is from \$100,000,000 to \$150,000,000. This,



it will be noted, is about one-quarter of his estimate of the gross drug business of the country. In this connection it may be well to note that a so-called drug store is a variety store and rapidly becoming a department store. Because these stores have druggists' licenses they are kept open from early morning until late at night, as well as Sundays and holidays. Probably they about double the [15] number of merchandising hours in the week that now obtains in the department stores in the large cities. They are very important distributors of cigars, candy, soda water and like drinks, and of toilet and fancy articles generally. The fact that they carry so large a variety of goods furnishes some ground for believing that the source of supply cannot be monopolized. On the other hand, a drug store that undertakes to limit itself to the drug business has small chance of surviving. The variety of goods for sale tends to attract the drug business to the sort of store promoted by the United.

From the foregoing it will be seen that the United Drug Company is mainly a manufacturing and wholesale concern, putting out now about \$8,000,000 at wholesale, owning a line of retail stores doing approximately \$5,000,000 of retail business; and connected in this effective and ingenious fashion with retail stockholders doing from \$100,000,000 to \$150,000,000. My own view is, based upon a variety of figures too long to state in detail, that \$150,000,000 is a low estimate of the figures covering the business of the retailers connected with the United Drug Company as its centre.

It is now proposed to consolidate the United Drug with the Riker & Hegeman Company. The latter is a New York Corporation with an issued capital stock of \$2,147,000 preferred and \$8,469,620 common. It conducts 81 retail stores, as follows:

<b>[16] Connecticut:</b>		<b>New York:</b>	
Bridgeport.....	1	Brooklyn.....	7
Hartford.....	1	Mount Vernon.....	1
New Britain.....	1	New Rochelle.....	1
New Haven.....	2	New York.....	41
Stamford.....	1	Rochester.....	2
Waterbury.....	1	Schenectady.....	1
	<hr/>	Troy.....	1
	7	Utica.....	1
	<hr/>	White Plains.....	1
		Yonkers.....	1
			<hr/>
District of Columbia:			57
Washington.....	1		<hr/>
Delaware:		<b>Pennsylvania:</b>	
Wilmington.....	1	German town.....	1
New Jersey:		Lancaster.....	1
Jersey City.....	1	Liberty.....	1
Newark.....	2	Philadelphia.....	4
Paterson.....	2	Pittsburg.....	1
Trenton.....	1	Wilkesbarre.....	1
	<hr/>		<hr/>
	6		9
	<hr/>		

Riker & Hegeman Company also owned all the issued capital stock of the William B. Riker & Sons Company, which conducts one store in New York City, and of the Jaynes Drug Company, which conducts 35 stores as follows:

<b>[17] Massachusetts:</b>		<b>[17] Massachusetts—Continued.</b>	
Boston.....	13	Springfield.....	3
Brockton.....	1	Worcester.....	1
Cambridge.....	1		<hr/>
Chelsea.....	1		31
Fitchburg.....	1		<hr/>
Haverhill.....	2	<b>Maine:</b>	
Holyoke.....	2	Bangor.....	1
Lawrence.....	1	Lewiston.....	1
Lowell.....	1	Portland.....	1
Lynn.....	1		<hr/>
New Bedford.....	1		3
Pittsfield.....	1		<hr/>
Salem.....	1	<b>Rhode Island:</b>	
		Providence.....	1

Riker & Hegeman Company also owns all the capital stock of Hegeman Drug Company, Riker Laboratories (Inc.), Arly (Inc.), and V. Vivaudou (Inc.). The combined annual sales of the Riker & Hegeman chain of retail stores are about \$15,000,000. In addition these Riker & Hegeman companies do an outside wholesale business of about \$385,000 annually. They also manufacture \$886,000 of goods for their own stores annually. The manufacturing plant of the Riker & Hegeman Company is located in New York.

In brief, the Riker & Hegeman Company has a chain of 117 stores doing a retail business of upward of \$15,000,000 a year, and controls manufacturing and wholesale concerns doing about \$1,200,000 a year. It has already been pointed out that [18] the United is a large wholesaler, selling about \$8,000,000 annually and with increasing capacity and an ambition to use that capacity. It does about \$5,000,000 retail business in its present own stores. The Riker & Hegeman Company is a small wholesaler and a large retailer. Mr. Liggett, in a letter to his stockholders dated November 12, 1915, speaks of the consolidation as adding \$16,000,000 volume to the United's present volume of business and refers to the volume of business that the United will have after the consolidation as almost \$35,000,000. These figures are slightly larger than the figures he has stated to me, but will probably be reached shortly, if not immediately, after the consolidation.

The proposed consolidation takes the form of a purchase of the property and assets of both the United Drug Company and the Riker & Hegeman Company by a new corporation, to be organized under the laws of Massachusetts or New York, with an authorized capitalization as follows:

First preferred stock, 7 per cent, cumulative dividends.....	\$7, 500, 000
Second preferred stock, 6 per cent, noncumulative dividends.....	10, 000, 000
Common stock.....	35, 000, 000

This stock is to be distributed as follows:

First preferred stock of new company:

To United Drug Co. preferred stockholders.....	\$2, 938, 950
To Riker & Hegeman Co. preferred stockholders.....	2, 147, 400

Total 7 per cent, cumulative, first preferred stock presently issuable.....	5, 086, 350
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Second preferred stock of new company:

To United Drug Co. common stockholders.....	5, 250, 000
To Riker & Hegeman Co. common stockholders.....	3, 859, 000

Total 6 per cent, noncumulative, second preferred stock presently issuable.....	9, 109, 000
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[19] Common stock of new company:

To United Drug Company common stockholders.....	11, 250, 000
To Riker & Hegeman Co. common stockholders.....	8, 800, 000

Total common stock presently issuable.....	20, 050, 000
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This will give to the present preferred stockholders of the United par for par of new preferred, but will give to the present common stockholders of the United \$225 par of common stock of the new company, plus \$100 par of noncumulative, or \$325 for \$100.

The Riker & Hegeman preferred stockholders are to get par for par of new preferred, and the Riker & Hegeman common stockholders par for par of common stock and approximately \$44 par value of the 6 per cent, noncumulative second preferred in addition—\$144 for \$100.

It will be observed that the proposed consolidation will result in increasing the gross capitalization of the two companies from about \$18,500,000 to about \$34,250,000, thus very nearly doubling its capital stock, on which, it is presumed, it sometime expects to pay dividends.

[20] It may not be immaterial to note that there are various other lines of drug stores not unlikely to be taken in by the United if the Government approves the consolidation with the Riker & Hegeman Company. The May Drug Company, of Pittsburgh, has some 10 or 12 stores; Dow, of Cincinnati, about 12; Taylor, of Louisville, 6; the Owl Drug Company, in which, as has already been pointed out, the United already owns a minority stock, has 22; Schultz, of Den-

ver, has 11 or 12; Riner, of Providence, 5. Most of the stores in these chains are already stockholders in the United. The American Druggist Syndicate is said to have been organized in imitation of the United, and to have some 12,000 retail stockholders, but it has no large chain of stores.

The manufacturing and wholesale drug business is apparently carried on by something like 400 different concerns, of which the largest is said to be Park, Davis & Company, of Detroit, credited, as Mr. Liggett says, with doing \$3,500,000, which is less than half what the United is now doing. These manufacturers and wholesalers compete with each other in interstate commerce for the trade of the retailers. They are now faced with the fact that the largest manufacturer and wholesaler which controls now \$5,000,000 of retail trade proposes, if this consolidation goes through, to control twenty-odd million dollars of retail trade, and has a position of influence, if not of domination, given by the relations above described to the stockholders, good for probably more than \$100,000,000 more. [21] While they may and do sell to Rexall (that is, United) stockholders, they are always at a disadvantage because all those customers are bound by interest and contract to give a preference to the United's goods. It is clear that there is a combination between more than 7,000 retailers to prefer the goods of one wholesaler to all other goods.

One of Mr. Liggett's avowed purposes in making this consolidation is to eliminate local competition. The Liggett (that is, United) stores and the Riker & Hegeman stores are frequently found on opposite corners or close by each other on important streets, as on Washington Street in Boston, carrying on sharply competitive sales in various lines of goods, at times with considerable price cutting. These two chains have also competed in the real estate markets for the most advantageous sites. This competition is always, of course, intrastate. The counsel for the United maintains, and with apparent soundness, that the Federal Government has nothing to do with the suppression of intrastate competition of this sort. [22] If the process stopped with the mere suppression of intrastate competition in the sale of goods and desirable sites, however illegal the combination might be under State laws; it would probably be outside of Federal jurisdiction. But it must not be overlooked that all of these retailers are in competition as purchasers from numerous wholesalers. To make a combination that kills off customers and unites a good share of the survivors so that 163 stores purchase as one obviously affects tremendously the opportunity of wholesalers to do their admittedly interstate business in an open field.

It is not necessary to go so far as to say that every chain of stores purchasing as a unit in interstate trade is necessarily an illegal combination. It would be an unsafe premise, however, to assume that every chain of stores, however it originates and whatever its effect may be upon the interstate trade of the numerous supply houses from which it draws its supplies, is not a combination within restraint of trade. The present problem, is, however, quite other; for we have a chain of stores combined as the United Cigars Stores Company was originally combined with a single central supply house, the United Drug Company, and that single central supply house has also a com-

bination or connection with more than 7,000 other drug stores bound to give its increasing output of druggist's supplies the preference.

Nor should it be overlooked that the contracts between the United and its stockholder-retailers, particularly [23] the earlier ones, indicate a clear purpose to dominate all the trade of those retailers that the United should at any time be in a position to dominate. It is but little, if any, exaggeration to say that those contracts require the stockholders to blacklist so far as practicable the products of the United's competitors. It did not require the Clayton bill to make illegal many of the provisions in those contracts.

I do not now enter upon any detailed discussion of the law. It is enough to say that in my view the United Drug Company, either with or without the proposed consolidation with the Riker & Hegeman chain of stores, falls within the condemnation of the principle admirably stated on page 58 of the Government's brief in the Harvester case as follows:

"The purpose of the antitrust act being, as we have seen, to preserve the competitive system, the answer must be that restrictions of competition by a combination becomes undue when it reaches the point of interfering with or threatening interference with the normal and effective operation of the law of competition in any particular branch of trade.

"There is strong support for the position that in contemplation of law that point is reached by any combination which causes competition in any given trade area to be substantially restricted; that beyond that it is but a question of the degree of harm inflicted upon the public, into which courts will not stop to inquire."

It may be worth while to test the main question in another way by putting two queries:

1. What advice would a careful lawyer give a client who asked whether he could afford to open a retail drug store in one of our eastern cities where this chain of 163 stores is now entrenched without connecting himself with the United? [24] I certainly should tell a client to stay out.

2. What advice would a sound-thinking lawyer give a present reasonably prosperous manufacturing or wholesaler of drugs if informed that the United offered to buy out that concern at a fair price? Clearly, "You had better sell out now before you are driven to the wall."

If this test is fairly and accurately applied, if the United has already created a situation so that there is not a fair and open field for either wholesalers or manufacturers, then there is a combination in undue restraint of trade.

Senator WORKS. Does that conclude your statement of the facts as you remember them?

Mr. SNOW. No. Do you mean down to the present time?

Senator WORKS. Yes.

Mr. SNOW. No, sir.

Senator WORKS. Go right on and state anything you wish to say.

Mr. SNOW. The next thing that happened, as I remember it, was that I went off for a while, and Mr. Anderson, I think, was sick, and one thing and another, and nothing happened for some time, until Mr. Anderson prepared what he called his final report and sent me a copy in order that I might look it over. Upon looking that over it seemed to me that it was a report of conclusions of law rather than a report of the facts, and I thought that he had omitted a great many facts which we believed were very material and that we had submitted in our letter of December 16. I took the matter up with Mr. Brandeis as to what it was wise to do, and he said he advised that we should write another letter to Mr. Anderson calling his attention to the fact which we thought had been omitted from his final report and which we deemed to be material, and also asking him to state how far his conclusions of law and facts were based upon the facts submitted in the report, or how far they were based upon facts not shown in the report; and if they were based upon facts not shown in the report, that he should state those facts in his report so that the Government in passing upon the question of whether or not there should be a proceeding brought would have all the pro-

ceedings before it on which Mr. Anderson had based his conclusions. We also asked him to bring this report or letter of December 16, which included a great many facts which he had not put in his report. Mr. Anderson decided not to send on to Washington our communication of December 16, but did modify his final report to the extent of stating that he thought as to certain conclusions that they were based solely on facts stated in the report, and that he had no other facts.

Senator WORKS. That communication that you sent to Mr. Anderson had better be included in the report.

Mr. SNOW. I have not a copy of it here. Mr. Anderson, have you that?

Mr. ANDERSON. Perhaps this is it.

Senator WORKS. Mr. Snow, please look at that and see if that is the communication to which you refer.

(A paper was handed to the witness.)

Mr. SNOW. Yes, sir.

Senator WORKS. This may go in the record, Mr. Chairman?

Senator CHILTON. Certainly; you may put in anything you want.

(The letter referred to, dated March 31, 1916, was marked "Snow Exhibit No. 4," and is as follows, the large numbers in brackets indicating the page numbers of the original typewritten manuscript:)

SNOW EXHIBIT No. 4.

[Page 1.]

(Stamped on margin:) Received & noted Mar. 31, 1916. G. W. A.

BOSTON, MASS., *March 31, 1916.*

GEORGE W. ANDERSON, Esq.,

*U. S. Attorney for the District of Massachusetts,*

*85 Devonshire Street, Boston, Mass.*

DEAR SIR: We thank you for the opportunity to examine the revised draft, under date of March 27, of your report to the Attorney General relative to the affairs of the United Drug Company.

We have no corrections to suggest in respect of such statements in your report as appear to be clearly statements of fact as distinguished from inferences of fact or matters of opinion; but we do feel that you have omitted from your report many facts which are not only material, but may also be controlling in any decision upon this matter, and we therefore ask you to submit with your report our communication of December 16, together with the exhibits attached thereto.

Furthermore, your report contains many inferences and deductions which may have been based either entirely upon the facts set forth in your report or in part or wholly upon other facts, information, or evidence which are not included in your report. It seems to us that it is a reasonable request that your report should show to what extent your inferences and deductions are based upon the facts stated in the report, and if they are based wholly or in part upon other facts, information, and evidence, that such facts, information, and evidence should accompany the report.

[2] We call your attention below to a few of the particular matters which we have in mind:

On page 15 of the report you use the following language:

"The degree of control growing out of the relations established between the United and its retailers through these contracts and through the investment by the retailers in the stock of the United, averaging about one thousand dollars each, it is difficult to estimate with accuracy. If the determination of the case were to turn upon that point, it would be necessary or advisable to have interviews with many retailers within and without the United circle, including, if possible, a reasonable number of the stockholders who have been disciplined or attempted to be disciplined. Correspondence with reference to a few cases before the grievance committee has been put before me. Most of

the complaints made by the United were because of the alleged failure of the retailer to push the Rexall remedies as vigorously as was desired. Attempts were not infrequently made to compel the retailer to agree to take a named amount of Rexall remedies within a designated period. It is a fair inference from this correspondence that a retailer who has once established even a fair amount of Rexall trade regards it as a pretty serious threat to his prosperity to be deprived of the so-called agency. I think this is particularly true in communities in which there are competitive stores. To take the Rexall agency away from one retailer and give it to his local competitor might easily spell ruin. The correspondence indicates that both the United and the retailer have a keen recognition of the grip that the United thus gets upon these stockholder-retailers."

The deductions and inferences herein expressed must, we assume, have been based wholly upon the correspondence in connection with the cases which have come before the grievance committee. We have, so far as we know, submitted to you all the correspondence with reference to every case of which the company has a record in the files of the company whether it has come formally before the grievance committee or came up otherwise for consideration. In our letter of December 16 we have given you a [3] schedule of every such case, the substance of the controversy, and the disposition which was made of it. We should be glad if you would include this statement in your report, and should also be glad if you would file with your report copies of all correspondence in connection with these cases, copies of which correspondence we shall be glad to furnish you for that purpose. If your inferences are based upon any other facts, evidence, or information, we request that the same be filed as a part of your report.

On page 16 you used the following language:

"How far the United really controls prices at the present time it is not easy to ascertain. The company now issues a loose-leaf catalogue, loaned only to the store to which it is sent, which contains a description and price list of hundreds of articles produced or furnished by the United, with wholesale and suggested selling prices—in some cases suggested minimum prices. Taking the conditions as a whole, I am not impressed that the elimination from the printed contracts with its stockholder retailers of the obligation to maintain retail prices has made any real change in price control. For all practical purposes the United exercises a dominating control over the methods under which the retailers shall market its goods. I can see no reasonable doubt that if the United found any of its stockholders cutting prices to any considerable extent or selling the United's goods to others than the retailer's own customers in the usual course of trade, it would claim that such retailer was failing 'to exercise the selling privilege in a manner satisfactory to said company' and would, if necessary, undertake to terminate the contract. While the provision for arbitration might under certain circumstances be successfully invoked, it would not in my opinion have much present effect in lessening the economic domination over the retailer created by the United's relation to its stockholder customers by these contracts and the other significant business facts."

[4] We shall be glad to have it specifically appear whether or not the inferences and deductions contained in the above quotation are based in whole or in part upon any facts other than those stated in your report, and if they are so based upon any other facts, information, or evidence, we should be glad to have them accompany the report.

"Nor should it be overlooked that the United is increasing its stockholder retailers by several hundred a year. It is also increasing its own products both in quantity and variety. Mr. Liggett says: 'We propose to have a line so that you can start a drug store out of our store.' Question: 'Your plan is, then, that your concern shall be able to produce enough, as you say, to stock a drug store?' Answer: 'That is my ambition.' Question: 'And the step you are now taking is, as you hope and believe, a step in that direction?' Answer: 'Yes.' This last question and answer referred to the then proposed purchase of and consolidation with the Riker & Hegeman Company. In fairness it should be added that Mr. Liggett also says that there will probably be certain products so extensively advertised and pushed by other concerns that a drug store would be practically compelled to carry in stock some things not of the United manufacture. At a later interview Mr. Liggett undertook to modify to some degree the above statement, saying that if the United were able to supply "33½ per cent, then we would have reached the millennium. That is as far as I can conceive of our ability to meet competition. I can not conceive anything higher than that. If of every dollar 33½ per cent was purchased in our plant it would be

a millennium. No one has ever reached it in a chain of stores except the Regal Shoe Stores.'"

We should be glad if you would submit in your report the entire transcript of Mr. Liggett's testimony before you.

On page 26a appears a statement:

"But I find it impossible to resist the conviction that the main source of the expected values in the United's stock is found in the domination or control of the market indicated under (c). It is [5] earning capacity based upon control or domination or, at any rate, on influence, growing out of a combination that I think the United States is seeking to capitalize."

We should be glad to have it appear whether or not this inference or opinion is based in whole or in part upon any facts other than those disclosed in your report, and if so, what the other facts, evidence, or information are.

On pages 26a and 26b you refer to the fraudulent use of the mails by the promoters of mining enterprises, and appear to draw a parallel between that case and the case of the United Drug Company. You state:

"In this connection I ought to file a caveat to the effect that this is not to be considered as a charge of fraudulent intent on the part of any parties involved in this present promotion."

We should be glad to have you state in your report whether or not you find any fact, evidence, or information that there has been any misrepresentation or misstatement, even if innocent, and if so, what that fact, evidence, or information is.

On page 32 you use this language:

"One immediate result of this combination in Massachusetts alone has been to put under common management 16 Liggett (United) stores and 31 Jaynes (Riker & Hegeman) stores. The obvious and inevitable result of this combination is to cut off all the purchases from wholesalers other than the United of all supplies hitherto sold in interstate trade that the United can furnish. There is no doubt that the result of this last consolidation, entirely apart from the general combination of the United, has been substantially to decrease the opportunities of interstate trade hitherto open to a large number of drug manufacturing and jobbing houses."

[6] We should be glad to have it appear in your report whether the opinion herein expressed is based in whole or in part upon any facts other than those disclosed in the report, and if so, what the other facts, evidence, or information are.

On page 33 you use the following language:

"In this connection, attention is again directed to the contracts between the United and its stockholder-retailers, and the effect of those contracts as the Rexall remedies acquire greater popularity. Popular demand for goods which come to be called for by name increase as a result of advertising and repeated sales almost as microbes increase. Now, the United's contracts, analyzed in the light of the conditions which more and more will surround the parties to those contracts, fall but little, if any, short of requiring the stockholders to blacklist so far as they practically may the output of the United's competitors. The earlier contracts, of course, were manifestly illegal in form; probably illegal even before the Clayton bill. Whether the later contracts standing alone are illegal may be open to more question. But taken as part of a general scheme to give to the United's stockholders an exclusive territorial opportunity to purchase and sell in United's line to retail customers only, I think it reasonably plain that these arrangements are a combination in undue restraint of the interstate trade otherwise available for manufacturing and wholesaling druggist's supply houses."

We should be glad to have it appear as part of your report whether there are any facts, information, or evidence upon which you base in whole or in part your conclusion in this paragraph other than the facts already stated in the report, and if so, what those other facts, evidence, and information are.

On page 35 you use the following language:

"To what degree its previous career has been marked by such price cutting and killing competition I should not be warranted in reporting without a more detailed examination into the history of the facts than with the force at my command I have been able to make. That there have been such instances, I am convinced."

[7] If, as we must assume, the opinion herein expressed is based upon facts, information, or evidence in your possession not disclosed in the report, we request that such facts, information, or other evidence be made a part of this

We have without reserve furnished you with all the information in our possession which you have asked for. You have informed us that a final determination of whether any action shall be taken in this matter rests with the Department of Justice in Washington. As it is possible that the department may regard other facts or evidence which we have presented to you and which you have not included in your report and which are not specifically set forth in our letter to you of December 16 or in the stenographic report of conferences with Mr. Liggett, as material in coming to any determination, we request that your report shall be accompanied not only by a copy of our letter to you of December 16 with the attached exhibits, but also with such additional information as we have from time to time supplied.

On page 6 there is a typographical error, we presume, as the words "and jobbing" are omitted where it is stated that the Massachusetts Company carried on "all the manufacturing business." In other words, it is "manufacturing and jobbing."

On page 13 you state: "The fourth form of contract, said to have been 'first used in about 1910 to 1914,' contains no express provision for the maintenance of resale prices." We suggest that this contract does not contain any provision in regard to the maintenance of resale prices, whether express or implied.

Yours, very truly,

LOUIS D. BRANDEIS,  
FREDERIC E. SNOW,  
*Counsel for the United Drug Co.*

Senator WORKS. Now, proceed, Mr. Snow.

Mr. SNOW. I was trying to think whether I had any interviews—what is the date of that letter?

Mr. ANDERSON. March 31, 1916.

Mr. SNOW. I do not recall that there has been anything since then. Mr. Anderson subsequently sent in his report with certain modifications. I do not think that I have conferred with Mr. Brandeis since then, except on one matter. That was the question about some Riker & Hegeman store, and it had a bearing on this whole question, and I advised the company about what I thought they had better do; and I spoke to him about it because it might have a bearing on this whole question, and he confirmed my views as to what ought to be done. I think that is all.

Senator WORKS. Was there an understanding between you and Mr. Brandeis as to his continuing in the employment in case trouble should come?

Mr. SNOW. No, sir; no understanding whatsoever.

Senator WORKS. This modified report to which you refer—is that the one that is included in the record already or was it subsequently in the record?

Mr. SNOW. I assume that that is the one that is in the record already.

Senator WORKS. Do you know whether Mr. Brandeis had any personal interviews with Mr. Anderson about this matter?

Mr. SNOW. Yes; he told me—I could not tell you how many—but I know that he spoke about talking this matter over with Mr. Anderson, and I think Mr. Anderson can tell you better about that than I can, because I made no request. He simply spoke of the fact that he had had a talk with Mr. Anderson.

Senator WORKS. You had no meeting with Mr. Anderson jointly with Mr. Brandeis?

Mr. SNOW. No, sir.

Senator WORKS. You were never there together, the two of you?

Mr. SNOW. No, sir. In fact, I do not know that in the beginning I even told Mr. Anderson that I had consulted with Mr. Brandeis, because the preliminary purpose was simply to confirm my own



view of the matter and advise these people to go ahead with the matter without reference to the Attorney General.

Senator WORKS. I suppose the filing of this joint opinion was to modify the views of Mr. Anderson, was it not?

Mr. SNOW. Mr. Brandeis thought Mr. Anderson was a very open-minded man, but I said at the time I did not think it would have any effect on him.

Senator WORKS. Did you know at that time what the relations between Mr. Brandeis and Mr. Anderson were?

Mr. SNOW. Only, for a great many years, in a certain sense, I had been opposed to Mr. Brandeis and Mr. Anderson. I knew of no relations they had.

Senator BORAH. You mean personally opposed?

Mr. SNOW. Well, they had been members of the Public Franchise League of Boston, and I had been on the other side. I knew of no relations between them except as members of the Public Franchise League. They had opposed a good many things that my clients wanted to do.

Senator WORKS. What is the Public Franchise League?

Mr. SNOW. That question has been asked of Mr. Anderson so many times in legislative hearings that perhaps he can answer it.

Senator WORKS. Well, let us have your views. You have been opposed to it or by it.

Mr. SNOW. The Public Franchise League was a more or less elastic association, as I understood it, of various people who felt that in certain matters of legislation the corporations might be getting more than they ought to get, particularly public-service corporations; and I do not know that the membership was always the same, but I think that Mr. Brandeis, Mr. Anderson, Mr. Warren, Mr. E. L. Sprague, and Mr. Filene were always members. Mr. Eastman, who was their secretary, is now a member of the Public Service Commission of Massachusetts. It was purely a voluntary arrangement. I do not think that there was any definite list of members at any one time.

Mr. ANDERSON. I do not think that Mr. Sprague was a member.

Mr. SNOW. I thought he was.

Senator WORKS. Do you know what the attitude of that league is toward what is called the Stevens bill—the price-maintenance bill?

Mr. SNOW. I never knew that they took any interest in anything except matters relating to the public franchises in Boston.

Senator WORKS. I know there is another organization.

Mr. SNOW. No; it was simply in connection with the granting of public franchises.

Senator BORAH. Mr. Snow, did Mr. Brandeis act in this matter as employed counsel or just as a friend to you?

Mr. SNOW. As employed counsel. That is, I told him that I had come to him for the opinion for my own personal satisfaction; but of course he got pay for his services.

Senator BORAH. Who wrote the opinion that has been filed here?

Mr. SNOW. It is more or less a joint production. My impression is that the statement of facts is largely taken from the statement of facts which I originally prepared. Then the discussion of the law is more or less Mr. Brandeis's. Then I took it and went over it and various changes were made, and it appears in its present form.

Senator BORAH. I understand that Mr. Anderson had said to you at some time that he thought this proposition which you were fathering with reference to this merger had some features which indicated that it was something like the Harvester Trust.

Mr. SNOW. If I can state what I understood to be Mr. Anderson's position, it was this: That he relied upon a statement of law which is contained in the Government's briefs in the Harvester case to the effect that, although a combination may not be actually using the methods of monopoly, if it is big enough so it can do so it is obnoxious to the Sherman law.

Senator BORAH. The United States Supreme Court decided that.

Mr. SNOW. I did not understand that they had. I understood that they were waiting for decisions in the Harvester case and the Steel case to know what the law was.

Senator BORAH. You understand the United States Supreme Court had not decided that the power would have to be exerted before it could be determined to be in violation of the Sherman law?

Mr. SNOW. I should say that the precise question raised in the Harvester case had not been decided.

Senator BORAH. I understand that; but had the Supreme Court decided that it is not an essential, if the power existed that it should be exerted in order to be in violation of the Sherman law?

Mr. SNOW. I would not pretend to say.

Senator BORAH. Did Mr. Brandeis take the view that you did with reference to what constituted a violation of the Sherman antitrust law, that there had to be an exercise of the power before it would be in violation of the Sherman antitrust law?

Mr. SNOW. No. I am not at all sure that Mr. Brandeis agreed with me as to what my belief on the Sherman law was. All that he did say was that this particular proposition, in his judgment, was not a violation of the Sherman law. I know that in the discussion he did not agree with me as to certain other matters, but he did not believe they were applicable to this particular case.

Senator BORAH. But Mr. Brandeis and yourself were not able to satisfy Mr. Anderson that it was not in violation of the Sherman antitrust law.

Mr. SNOW. We certainly were not.

Senator BORAH. Then, in so far as you employed Mr. Brandeis to modify the views of Mr. Anderson, you did not succeed?

Mr. SNOW. I did not employ him for that purpose.

Senator BORAH. I thought so.

Mr. SNOW. I employed him because I was advising my people to go ahead and complete this merger. Notwithstanding I had already decided that it was not in violation of the Sherman antitrust law, I wanted to have my opinion confirmed by some one else.

Senator BORAH. I did not mean it was influencing Mr. Anderson in any improper way, but by reason of the combined views of yourself and Mr. Brandeis upon that question you supposed it might have had the effect of showing Mr. Anderson that he was in error? It seems that Mr. Brandeis thought he was of an open mind and he thought he could convince him.

Mr. SNOW. That Mr. Brandeis thought he was a man that would change his mind if he thought he was wrong.

Senator BORAH. But you did not convince him that he was?

Mr. SNOW. I did not.

Senator BORAH. You understand, then, that the district attorney is of the opinion that your proposition is in violation of the Sherman antitrust law?

Mr. SNOW. I so understand it.

Senator BORAH. And so entertains that opinion now?

Mr. SNOW. I so understand it, sir.

Senator BORAH. Had you ever talked with Mr. Brandeis about his view of the Sherman antitrust law as a general proposition, as to the wisdom of it, and the strict enforcement of it, and so forth?

Mr. SNOW. I have never had any talk with him in regard to the matter, except in connection with this case, as applied to this particular case, and the other question that I referred to in connection with the Shoe Machinery Co.

Senator BORAH. Well, it was not by reason of any liberal views which he might entertain with reference to the Sherman antitrust law that you employed him?

Mr. SNOW. No; I supposed that would be the other way. I thought if we could get by him we could get by anybody.

Senator BORAH. You did not know anything about his views with reference to the regulation of monopoly rather than destroying it?

Mr. SNOW. No; I know nothing about that.

Senator WORKS. Mr. Snow, you say that the purpose in consulting Mr. Brandeis was to satisfy your own mind?

Mr. SNOW. Rather to relieve me, to a certain extent, of the responsibilities that I was assuming.

Senator WORKS. To do that, it was not necessary to file an opinion with the district attorney?

Mr. SNOW. No; that came later.

Senator WORKS. Evidently you filed an opinion with the district attorney in order to inform his mind on the subject and, if possible, change his views?

Mr. SNOW. Undoubtedly, if we could do it; but that was not the reason.

Senator WORKS. I am talking about the object of it, not your hope of success.

Mr. SNOW. That was not the reason I went to Mr. Brandeis originally.

Senator CHILTON. As I understand it, your purpose in going to him originally was to divide responsibility. You felt you were taking a great responsibility to advise clients in such an important business venture in the teeth of the opinion of the district attorney and the investigation by the Department of Justice.

Mr. SNOW. That is true.

Senator WORKS. That it all.

(The witness was excused.)

## TESTIMONY OF GEORGE W. ANDERSON, ESQ., OF BOSTON, MASS.

Senator WORKS. Mr. Anderson, just tell us now all you know about this, will you?

Mr. ANDERSON. I think you would object, Senator, if I followed that request. See this mass of papers.

If I may see my report, I should like to call attention to two or three salient facts concerning the delay, and then I will limit myself—perhaps I can get along without it.

About September 24 last I called the attention of the Department of Justice to a newspaper slip referring to the proposed merger of the United Drug Co. and the Riker-Hegeman Co., inquiring, as I recall it, as to whether any investigation had been made, and as to whether they had any opinion as to whether that was obnoxious to the Sherman Act.

Under date of September 28 I was instructed to ascertain and report the facts. That I proceeded to do. I got into communication with Mr. Snow, as he has stated, and shortly was engaged in getting the facts together—almost entirely through data furnished by Mr. Snow and obtained by him from his client from day to day. This long statement came to me on October 19. I would read a statement and then I would want something more.

Senator BORAH. May I interrupt you there in regard to an idea that has passed through my mind? What caused you to initiate this investigation? How did you come to the conclusion that it devolved upon you to begin the investigation with reference to these facts?

Mr. ANDERSON. This was a Massachusetts affair. The United Drug Co. was reported in the papers as a big proposed consolidation, and I thought it was the duty of the United States attorney to call matters of that kind in his district to the attention of the Department of Justice and to take the department's instructions as to whether it was proper for further inquiry. That I did, and proceeded to make the further inquiry when so instructed.

Almost immediately after I had started I came into communication with Mr. Snow, and most of my investigation was made through him. I have certain other reports which I hope the committee will not ask me to spread upon the record. For, in order to conduct an investigation of that kind efficiently, one must send for people who are in direct relations with other parties and ask them to give facts. No lawyer can grasp the trade facts concerning a great industry unless he has the assistance of men who are in that industry. I have some reports here which to some degree affected my mind, and which I think your committee will not think it a good plan to spread on the record.

From time to time I wrote Mr. Snow and asked for this and that and the other. There was quite a lot of correspondence, but it adds practically nothing to what is now before you in the papers which are here.

As he said, on October 25, after I had gotten a pretty large mass of stuff together, I asked Mr. Liggett to come in. I then went through considerable of an examination of him (not quite as intelligently as I might have desired, because I had not the case well prepared). That was stenographically reported and written out; one copy I kept and Mr. Snow had another copy. I think there was an understanding that if he found any errors, either in the transcription or in the statement, his client should have an opportunity to correct or supplement. I am not sure that anything was done of that kind. I think on another occasion I asked him to come in and make some supplementary statement, which was rather briefer and directed to some minor matter.

At the end of this interview on October 25, as I recall it, I did say, in substance, to Mr. SNOW, that as the consolidation was shortly pending, as he had furnished me with frankness and courtesy everything I had asked for, I thought it was only fair to tell him that my notion was against what his clients were proposing to do and, perhaps, against what they had done. I said, "I am not closed-minded on the matter; I am open to conviction; but I think it is only fair to tell you that my preliminary notion is against you."

Senator BORAH. Have you stated in the final report which you sent to the Attorney General all the reasons which now appear to your mind as to why this was in contravention of the Sherman anti-trust law?

Mr. ANDERSON. I have stated *generally* [NOTE.—Italic matter so marked by Mr. Anderson.] my notions (which have somewhat developed since October 27), but let me point out the fact that I have not put into that opinion or any brief anything on the law, except one or two references. I thought that was more for the department. I did state some of my inferences, leaving the department to draw mainly its own conclusions. It is not unlike a master's report, where you leave the court to deal mainly with the law and you deal with the facts yourself. I do not think the practice between local district attorneys and the Department of Justice is stratified. But, as I understand it, what I have done there has come more and more to be the practice where you are dealing with concerns that want to be law-abiding or lay their cards on the table, so to speak, and give you the facts, and that want, if they are against the law, to get within the law.

Senator BORAH. The reason I asked you that was because if you had not stated the reasons I would want to ask you for them, but if they are printed generally in the report we can read it later.

Mr. ANDERSON. They are printed *generally* in the report; and I do not think at this time I could state them as well as I stated them there, although it is very far short from being a brief on the law.

Mr. SNOW and I had some discussion, some of it serious and some of it rather chaffing. He alleged that I did not know what the Sherman law meant. I probably replied that nobody did, in view of the decisions of the Supreme Court and the lower courts, and suggested, among other things, that he should get that illuminating book written by ex-President Taft and see if he could not learn something about the Sherman law. We went off with good-natured differences of opinion, although I do not think his client was particularly good-natured at that time.

Not very long after that either he or Mr. Brandeis indicated the fact to me that Mr. Brandeis had been consulted about this matter, and that he also was of the opinion that I was all wrong in my notion. I had one—I do not remember having but one—considerable interview with Mr. Brandeis about the matter. It must have been early in November, I should suppose. It probably was within 10 days or 2 weeks of that October 25 interview. I can not fix the date. Mr. Brandeis undertook to convince me that my notion of the Sherman law as now construed by the courts was against my idea as to what was done in this case. We had a long talk; discussed the cases pro and con; more talk upon what the decisions *are* than what the deci-

sions *ought to be*. I told him, in substance, that I might be all wrong about it, but I could not quite get it out of my mind that this concern, in the nature of its organization, was getting—if it had not already gotten—into a position to dominate the drug-store trade. I meant by the drug-store trade the opportunity to do business in these drug stores, which are about 45,000 or 50,000 in number throughout the country, licensed to sell drugs, and therefore open about double the number of merchandising hours of the down-town department stores, and perhaps for 50 per cent more merchandising hours than even a suburban store, and each occupying a somewhat territorially limited field. Those stores are becoming variety or department stores. It is that field of chance to have a drug store, with a drug-store license, which is a somewhat limited field, and which I thought this concern was getting a too powerful position in. He and Mr. Snow both argued that it was an almost negligibly small percentage of the kinds of merchandise dealt in in these stores which these particular stores dominated. I did not think that was the gist of the situation on the facts or the fair inference of facts.

There are a lot of data in these documents, which the committee have ordered printed, bearing upon those differences of fact and of inferences of fact. I never was dogmatic in my notion that the court would now hold that they were not outside the condemnation of the Sherman Act. I think I said that our Massachusetts Federal judges would probably go against the Government on such an issue. That was my opinion, and I think I stated it to one or both of them.

I would like to say a word about the delay. Mr. Snow stated most of the facts. I did intend to get this report in, so that the Government down here could take the responsibility off my shoulders before the merger should go through. But he did say, and with entire fairness, that he did not think I ought to send down a report based mainly upon facts which they were furnishing me with, without giving them every fair opportunity to ascertain and furnish *all* the material facts. They were getting facts from day to day. There were auditors' reports, and this and that and the other that I kept asking for. I said I did not want the Government prejudiced by the argument that might be made that the Government had stood by and seen this merger go on, and ought not thereafter to question it. He wrote me a letter on November 30 agreeing, in effect, that that argument should never be made if the Government thereafter thought proceedings should be brought.

Then we got our report nearly ready in the latter part of December. From there down the delay is due to my fault or misfortune. I was taken with the grippe, which laid me out of the game for several weeks, and until about the middle of January. Then, in early February, this committee drafted me, and I spent most of my time in February and in March on the road between here and Boston, and in attendance here upon this committee. So it was not until late in March that I finished that report. I actually filed it on April 12. Those are the reasons for the delay.

My report speaks for itself. The tentative notions that I expressed on October 25 to Mr. Snow are the notions which—not dogmatically or confidently, but still as my best judgment as to what the application of the Sherman Act ought to be to this kind of an organization—I still have.

Senator WORKS. You still have the views that you expressed in that report, have you, Mr. Anderson?

Mr. ANDERSON. Yes.

I sent that report in. I have had some discussion with Mr. Todd, of the department, relative to it, but have had nothing definite as to whether they, in the department, hold my views or not. I think my assistant up there, Mr. Rogers, the special assistant in Sherman-Act matters, is against me. I have Mr. Snow, Mr. Brandeis, and Mr. Rogers all against my views.

Senator CHILTON. You spoke of the magnitude of the drug business and stated that it embraced 45,000 stores. Do you mean that this company has 45,000 stores or that that is the whole business?

Mr. ANDERSON. No; there are about 45,000 to 50,000 licensed drug stores in the United States. The business of this concern is mostly in the United States, although it does some business in Canada and Great Britain. They have something like 7,000 stockholders who are retail druggists, and thus have an interest in their business, and also contracts with them to give their so-called Rexall products the preference in advertising, offering, and sale. They describe them as agents. They also own 150 or 160 drug stores as a result of this last combination absolutely. The United Co. is a big wholesaler and was a comparatively small retailer through its former chain of stores. The Riker & Hegeman Co. was a small wholesaler and a larger retailer through a larger chain of stores. This combination adds a large amount of retail business and a small amount of wholesale business and gives the consolidated concern, I think, about \$35,000,000 gross business in wholesale and retail. The gross amount of drug business that there is in the country it is almost impossible to get any adequate data on, because, as I intimated a moment ago, these drug stores are becoming increasingly variety or department stores. But probably there is not less than \$150,000,000 a year of business which would be called legitimate drug business. Drug stores have always done a large cigar and soda-fountain business. The statistical problem that you are dealing with is a pretty complicated problem, on which you can hold all kinds of views.

Senator BORAH. Mr. Anderson, you had an interview with Mr. Brandeis in which you discussed the law, you said, at one time?

Mr. ANDERSON. I think we discussed more, then, the application of the facts or the inference of facts in this case. We did have some discussion of the law—probably in November.

Senator BORAH. You have read, of course, the opinion which they filed with you and which Mr. Brandeis signed?

Mr. ANDERSON. Yes, sir.

Senator BORAH. Is there anything in the interview which you had with Mr. Brandeis, that you can recall now, that the committee ought to have in order to have his view about the matter, which is not contained in his legal brief which he signed?

Mr. ANDERSON. I could not now remember anything.

Senator BORAH. In other words, so far as you can now recall and your memory serves you, whatever view he has in regard to this case is found fully in this brief which he signed?

Mr. ANDERSON. I do not know that I went so far as that. I understood that he was of the opinion that I could not get away with a Sherman Act civil proceeding (nobody ever thought of criminal

prosecution) on the facts as he understood them to be here. Whether he committed himself, as he would have if he were a judge, to all the notions that are expressed in that brief of the law, I do not know. It was in the nature of an advocate's brief to a man who held a quasi-judicial position. I think I later told him chaffingly that I hoped that when he got on the bench he would not attempt to rule such bad law as he had tried in this case to make me adopt.

Senator CHILTON. You knew that he was employed by this—

Mr. ANDERSON. Certainly. He was employed to give his opinion, and he undertook to convince me that I was wrong and he did not succeed. I think I may properly add that I think I have had more differences of opinion and violent but friendly controversies with Mr. Brandeis than with any one other living man, unless it be Mr. Sherman L. Whipple.

Senator BORAH. Eliminating the presence of yourself in this matter, what do you think of the proposition of undertaking to control the administration of the Sherman antitrust law by satisfying the district attorney that he ought not to consider it at all? Do you not think it is the district attorney's duty to send in those facts to the Attorney General as he sees them rather than try the matter as a judge?

Mr. ANDERSON. It would be wholly unsafe, would it not, to consider that the opposition would agree with you? I do not understand that there was any such attempt made.

Senator BORAH. But evidently there was a desire to have you modify your view.

Mr. ANDERSON. Well, I think that is true.

Senator BORAH. It must have been that this very important brief filed with you was filed for a purpose.

Mr. ANDERSON. That is a brief on the facts as well as on the law, and the documents here show that they thought many facts important that I did not so regard.

Senator BORAH. It is quite proper for them to put the facts before you, of course, and I think they have very generously done so in this matter; but when it comes to arguing out a case and trying it before a district attorney, I think that is probably a reason why many men never reach a prosecution under the Sherman law in many of these instances.

Mr. ANDERSON. I do not think that had ever occurred to me. It has been my practice as United States attorney that if I felt I could get any help out of anybody I heard them in a quasi-judicial way. I have done it right along. I may be wrong, Senator, but I have done it because I thought I thus guarded myself against making errors that I otherwise might have fallen into.

Senator BORAH. I think it is quite proper to give facts, but I did not know that the practice prevailed of filing briefs with the district attorney relative to the law.

Mr. ANDERSON. I have had briefs in other than Sherman Act matters—quite a number of them.

Senator WORKS. When did you first learn that Mr. Brandeis had been retained in this matter?

Mr. ANDERSON. Within a few days after October 27.

Senator WORKS. What have been your relations with Mr. Brandeis in the past?



Mr. ANDERSON. Mr. Brandeis and I have been affiliated in the Public Franchise League and in some other matters, where we have held *generally accordant* views and *in detail* often very *discordant* views for a great many years; 15 or 20 years. I have had some litigation with Mr. Brandeis's office against Mr. McClennen. I can recall no instance in which I have had any business connection with Mr. Brandeis's office or with him out of which any money has come to me or to my office, with the possible exception of one case, where we made Mr. Snow's clients modify some of what we thought were their unjust demands on the public in 1904 or 1905. My notion is that I was paid as counsel in that case, and I assume Mr. Brandeis was one of those instrumental in employing me before I was a member of the Franchise League.

As I said a moment ago, Mr. Brandeis is a man with whom I suppose I have had more controversies than with any one other living man, unless it is Mr. Whipple. But I have the profoundest respect for his ethical perception, his character, his analytical power, the illumination that he brings to bear upon any question. I go to him whenever I am at a loss as to what my duty or course may properly be on any matter involving ethics—professional ethics, public ethics—or any other question. I would rather have the illumination of his mind as to what my duty may be where I am at a loss than the illumination of any other one mind with which I have come in contact. He is impersonal, impartial, judicial, powerful. He is always ready to extend the benefits of his analytical, judicial power to help anyone who he believes honestly wants help and is disposed to follow the right course. He is not what I should call an intimate friend of mine.

Senator WORKS. That was your estimate of Mr. Brandeis and your feeling toward him at the time this so-called report was filed?

Mr. ANDERSON. Yes; and it has been my feeling for many years. In the Boston & Maine matter we had violent differences of opinion which we have never been able to reconcile.

Senator WORKS. What other organizations have you and he belonged to besides the Public Franchise League?

Mr. ANDERSON. I remember at the present time no other organization where we have had, as you may say, *general* active affiliations. There have been all kinds of questions that have come up—

Senator WORKS. Have you ever had any connection with the American Fair Trade League?

Mr. ANDERSON. No, sir; I never heard of it that I can recall until this investigation started two or three months ago.

Senator WORKS. That is not a Boston concern, is it?

Mr. ANDERSON. Not so far as I know. I learned all I know about it when I was down here before.

Senator WORKS. What are the objects and purposes of the Public Franchise League?

Mr. ANDERSON. That is now out of existence. I think Mr. Snow stated that accurately. We had a notion a dozen or 20 years ago, some of us, that the Commonwealth of Massachusetts was largely run by the public-service corporations. It was dominated by the Republican Party, and we some of us thought that the Republican Party was dominated by the public-service corporations, and that they were getting too much, and that the public interests were not—

Senator BORAH. Brandeis was a Republican at that time?

Mr. ANDERSON. I do not think so. I do not know, but I do not think so. It was formed before I became a member. Mr. Filene, Brandeis, Warren, Lehy (who was afterwards president of the City Club), James Richard Carter—I do not know how many there were. It was not a very large organization during the time I was a member of it. The people who were active could be placed around this table.

Senator WORKS. You say the league has gone out of existence?

Mr. ANDERSON. I have not heard of its being in existence during the last year or two. Mr. Eastman, who was the secretary of it during the last years of its life, has gone on the public-service commission; and I have gotten into official life and am disqualified for that kind of activity.

Senator BORAH. Did it go out of existence about the time the Democrats got into power in Massachusetts?

Mr. ANDERSON. About that time. The public interests were generally regarded as much more adequately safeguarded after Mr. Wilson's administration came in than before. There was not the same need of guarding the public interests and struggling for justice as there was before.

Senator BORAH. I suppose they changed their minds when they put Gov. McCall in this last time?

Mr. ANDERSON. I have heard suggestions during the last few weeks that it was going to be necessary to rehabilitate and reestablish the Franchise League. Mr. Snow can tell you whether the intentions of his clients are such as to make that course necessary.

Mr. SNOW. I think you might add that the activities of the league were confined almost entirely to my clients.

Mr. ANDERSON. Mr. Snow's clients were regarded as being the chief people that needed looking after.

Senator CHILTON. I should like to add that the Department of Justice has come to no conclusion in this matter.

Mr. ANDERSON. Mr. Todd was up in Boston the other day, and we had some discussion about the matter. He had read the report; we went over the present status of the chief trust cases now up before the Supreme Court; some of the lower court cases; considered the time of getting a hearing if he brought a suit. There was no definite conclusion stated to me by Mr. Todd. I had a notion he had not gone over it with the Attorney General, but I do not think I am authorized to state that.

Senator CHILTON. Is it not a fact that on the main facts concerning this matter there is no difference in your report and the brief of Messrs. Snow and Brandeis? There is no difference, is there, in the statement of the facts?

Mr. ANDERSON. No; there is no material difference. Nearly all my facts are derived from them. In one clause of the report there is a sentence I would have been glad to read to you. I stated something to this effect: That if and insofar as the conclusion as to the duty of the Government might turn upon the question whether the defendants have been guilty, in numerous instances, of unfair practices in trade, there was no sufficient evidence to warrant proceeding; that, on the other hand, there had been no such investigation made as to warrant me in reporting that there h

be that a further investigation of that subject would be necessary if, in the view of the department, that should be the turning point of the case.

You gentlemen will easily see you can make a report of this kind at comparatively small expense to the Government. But if you undertake to get at all the facts necessary to a prosecution relative to unfair practices in trade in an industry extending all over the country, you have got to have a large number of investigators and put the Government to an expense of many, many thousands of dollars, and be a long time at it. I did not feel warranted in making the suggestion that we should cover the country with investigators of the drug trade until I had submitted this preliminary report, and until the gentlemen here in the Department of Justice had expressed at least some *tentative* notions as to what the duty of the Government might be as to proceeding further or not proceeding further. That is the present situation.

Senator BORAH. You did not call this matter to the attention of what is known as the Federal Trade Commission, did you?

Mr. ANDERSON. I did not think I had any authority to bring matters to their attention. I did not, to answer your question categorically.

Senator BORAH. I was not reflecting upon your performance of duty; I think there is no reason for that. But the Federal Trade Commission is supposed to have some authority to direct those who want to organize for the purpose of creating larger corporations, etc., and doing a larger business, is it not?

Mr. ANDERSON. I would not venture an opinion as to what functions that commission, under the law, is going to perform. I looked into it a little at one time, and I think I formed the tentative opinion that I did not have any right to try to unload the responsibilities of my office on it. That is as far as I got.

Senator BORAH. I think you were wise.

Mr. ANDERSON. I did not go into the question with them. I thought I was not correlated with them as an official.

Senator BORAH. I saw a statement published in the newspapers some 9 or 10 months ago in which they requested the Department of Justice to consult with the commission before beginning any proceedings under the Sherman antitrust law.

Mr. ANDERSON. I do not know anything about that. You have in mind that the district attorney has no independent power on Sherman Act matters. He can not bring any prosecutions. He is an absolute subordinate of the Attorney General in those matters.

Senator WORKS. I think that is all.

Senator CHILTON. What is that you referred to, Senator Borah? Have you an official statement from the Federal Trade Commission?

Senator BORAH. What I referred to was a statement published in the newspapers a short time after the organization of the Federal Trade Commission, to which the Attorney General, as I understood, replied that he still reserved the right to—

Senator CHILTON (interposing). I have seen that; but I think that the Federal Trade Commission has made an eminent success of what it started out to do.

Senator BORAH. I think it has, too, of what it started out to do.

Senator CHILTON. Yes. I do not agree with that inference of yours as to what it started out to do.

Senator BORAH. I think it started out to emasculate the Sherman Antitrust Law, and it is succeeding very well in doing it. It had to do that, if it carried out the law of its creation.

Senator CHILTON. I do not believe you can make that good.

Senator BORAH. I have no doubt about it, myself.

Senator CHILTON (continuing). On a square fight. I think it has been a very useful body, and it is composed of very useful men.

Senator BORAH. I am not reflecting upon the men, of course. They are a high class of men; but I am opposed to the law. It is the first step in the vicious scheme for the regulation instead of the destruction of monopoly.

Senator CHILTON. As I understand, this was primarily a purchase by a wholesale concern of some retail drug stores. That is in effect what it is; it was the taking over of them, was it not?

Mr. ANDERSON. Primarily, yes; that is to say, the thing purchased is a big retailer and a small wholesaler.

(The witness was excused.)

Senator CHILTON. Let me ask you about one matter before you leave, Senator Borah. We were directed as to the extent to which we would go here. Would there be any objection upon the part of any members of this committee to our sending for Mr. Harlan or some other member of the Interstate Commerce Commission to straighten up some—what I consider to have been—arguments or misunderstandings in regard to the position which Mr. Brandeis held toward that body in the Five Per Cent Rate Advance matter? I should like to ask some member of the commission, I care not which one—I never talked to one in my life regarding it, but I should like to ask, say, Mr. Harlan, who signed the letter to Mr. Brandeis—some questions concerning that matter.

Senator BORAH. I have no objection.

Senator WORKS. I have no objection to your calling anybody you want to, Mr. Chairman.

Senator CHILTON. I wish the clerk of the committee would get Mr. Harlan on the phone.

Senator BORAH. We do not want to wait until Mr. Harlan comes.

Senator CHILTON. No; I would suggest that we take a recess until 2 o'clock.

Senator WORKS. That will be a little early. Make it 3 o'clock.

Senator CHILTON. Would that suit you, Senator Borah?

Senator BORAH. I will endeavor to be here at that time; yes.

Senator WORKS. That is all, is it?

Senator CHILTON. That is all. We have no other witnesses. If we get Mr. Harlan or do not get him, is there anything further about this matter? Are there any other witnesses to be called?

Senator WORKS. I spoke to the committee about another matter, and since the subcommittee was authorized to resume its sessions I wrote about that matter but have had no answer, and I will not ask the committee to delay its sessions.

(At 12.42 o'clock p. m. the subcommittee took a recess until 3 o'clock p. m. There were present on the recessing Senators Chilton (chairman), Borah, and Works—a quorum.)

## AFTER RECESS.

The subcommittee reconvened, after the expiration of the recess, at 3 o'clock p. m., when there were

Present: Senators Chilton (chairman), Fletcher, Walsh, Borah, and Works.

Senator WORKS. Before we proceed, Mr. Chairman, I want to incorporate in the record a part of a hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives on January 9, 1915, on the bill (H. R. 13305) to prevent discrimination in prices and to provide for publicity of prices to dealers and to the public, known as the Stevens bill. I desire to have inserted in the record pages 3 to 72 of that hearing, it being a statement by Mr. Brandeis before that committee.

(The matter referred to is as follows:)

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
HOUSE OF REPRESENTATIVES,  
Washington, D. C., Saturday, January 9, 1915.

The committee met at 10 o'clock a. m., Hon. William C. Adamson (chairman) presiding.

The CHAIRMAN. You may proceed, Mr. Brandeis.

**STATEMENT OF MR. LOUIS D. BRANDEIS, ATTORNEY AT LAW,  
BOSTON, MASS.**

Mr. BRANDEIS. Mr. Chairman and gentlemen, I desire to speak in support of the Stevens bill, which reads as follows:

"A BILL To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public.

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in any contract for the sale of articles of commerce to any dealer, wholesale or retail, by any producer, grower, manufacturer, or owner thereof, under trade-mark or special brand, hereinafter referred to as the 'vendor,' it shall be lawful for such vendor, whenever the contract constitutes a transaction of commerce among the several States, or with foreign nations, or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or the District of Columbia, or with a foreign nation or nations, or between the District of Columbia and any State or States or a foreign nation or nations, to prescribe the sole, uniform price at which each article covered by such contract may be resold: *Provided,* That the following conditions are complied with:

"(A) Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale; nor shall such vendor be a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail or to the public.

"(B) Such vendor shall affix a notice to each article of commerce or to each carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract of sale stating the price prescribed by the vendor at the time of the delivery of said article as the uniform price of sale of such article to the public, and the name and address of such vendor, and bearing the said trade-mark or special brand of such vendor. Such article or articles of commerce covered thereby shall not be resold except with such notice affixed thereto or to the cartons, packages, or other receptacles inclosing the same.

"(C) Such vendor shall file in the Bureau of Corporations a statement setting forth the trade-mark or special brand owned or claimed by such vendor in respect of such article or articles of commerce to be covered by such contract of sale, and also, from time to time, as the same may be adopted or modified, a schedule setting forth the uniform price of sale thereof to dealers at wholesale, and the uniform price of sale thereof to dealers at retail from whatever source acquired, and the uniform price of sale thereof to the public, and upon filing such statement such vendor shall pay to the commissioner of corporations a registration fee of \$10. The price to the vendee under any such contract shall be one of such uniform prices to wholesale and to retail dealers according as such vendee shall be a dealer at wholesale or a dealer at retail, and there shall be no discrimination in favor of any vendee by the allowance of a discount for any cause, by the grant of any special concession or allowance, or by the payment of any rebate or commission, or by any other device whatsoever.

"(D) Any article of commerce or any carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract and in possession of a dealer may be sold for a price other than the uniform price for resale by such dealer as set forth in the schedule provided in the next preceding paragraph (C): First, if such dealer shall cease to do business and the sale is made in the course of winding up the business of such dealer, or if such dealer shall have become bankrupt, or a receiver of the business of such dealer shall have been appointed, provided that such article or articles of commerce shall have first been offered to the vendor thereof by such dealer or the legal representative of such dealer by written offer at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, or, second, if such article of commerce or contents of such carton, package, or other receptacle shall have become damaged, deteriorated, or soiled: *Provided*, That such damaged, deteriorated, or soiled article shall have first been offered to the vendor by such dealer by written offer, at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, and that such damaged, deteriorated, or soiled article shall thereafter only be offered for sale by such dealer with prominent notice to the purchaser that such article is damaged, deteriorated, or soiled, and that the price thereof is reduced because of such damage."

Following the decisions of the Standard Oil and Tobacco cases by the Supreme Court in the spring of 1911 there was widespread consideration of the trust problem. The discussion resulted in the general conviction that there existed trust evils which called for a remedy. There was, however, a wide difference of opinion as to what the nature of that remedy should be. Some people believed that trusts and monopolies in private business were inevitable and perhaps desirable and that the remedy to be applied should be a "regulation of monopoly." A far larger number of Americans became convinced that trusts and monopolies in private business were neither inevitable nor desirable, and that they were in fact largely a result of unrestricted, unfair, and oppressive competition. They therefore proposed as a remedy the "regulation of competition." That policy was adopted by the Democratic Party and by a large part of the Republican and by some Progressives. The adoption of that policy led to the enactment of the Clayton bill and the Federal Trade Commission bill. The Stevens bill, if enacted, will further supplement the Sherman antitrust law.

Unrestricted competition, with its abuses and excesses, leads to monopoly, because these abuses and excesses prevent competition from functioning properly as a regulator of business. Competition proper is beneficent, because it acts as an incentive to the securing of better quality or lower cost. It operates also as a repressive of greed, keeping within bounds the natural inclination to exact the largest profit obtainable. Unfair and oppressive competition defeats those purposes. It prevents that natural development which should attend rivalry and which gives success to those who contribute most to the community by their development of their own business and the exercise of moderation in the exaction of profits. It substitutes devious and corrupt methods for honest rivalry and seeks to win not by superior methods, but by force. Its purposes is not to excel, but to destroy. The Clayton Act and the Federal Trade Commission act are designed to aid in preventing monopoly by preventing unfair or destructive competition, and the worst form of illegitimate

competition has been found to be price cutting. All the investigations in Congress and elsewhere have confirmed this conclusion. Monopoly is the natural outcome of cutthroat competition. With the exception of the railroad rebate, cutthroat competition was the most powerful of all the weapons which the Standard Oil Co. employed. It was the most powerful of all weapons employed by the Tobacco Trust. The Standard Oil Trust would cut the price in the districts where a competitor established himself, and thus destroy him, meanwhile reimbursing itself for the cut in that region by charging high prices elsewhere.

The Tobacco Trust through its "fighting brands" and "fighting subsidiaries" entered deliberately upon the policy of destroying a competitor. When the Tobacco Trust entered upon the competition in England it set apart a \$5,000,000 fund to be sunk in overcoming their British competitors. You know the result of that contest. The Tobacco Trust confirmed its monopoly of America, aided in establishing a powerful British company, and jointly with it acquired control of a large part of the rest of the world. There you have examples showing how cutthroat competition creates monopoly. Consequently in all recent intelligent consideration of the subject by Congress and the State legislatures the prevention of cutthroat competition has occupied much attention.

The Stevens bill is framed on these lines. It also is a bill to prevent monopoly; to prevent it by preventing cutthroat competition. It carries forward in another respect the policy adopted by the Democratic Party and approved by a large part of the Republican Party and by some of the Progressives of "regulating competition."

Let us examine specifically what the Stevens bill undertakes to do. It declares that when a manufacturer, producer, or grower places upon the market any article under a trade-mark or special brand he may by contract establish the price at which that product shall be sold to the public. Now, if you were to ask any body of men who had not made a special study of law—either business men or farmers or workmen—whether this should be allowed, the answer of every one would be, "Of course. Why should there be any question about it?" They would say that the only question on which men might differ was how the contract to maintain standard prices should be enforced—whether only by suit for damages, for breach of contract, or by making the violation of the contract punishable.

Mr. TALCOTT. Really the Supreme Court has held that an agreement of that kind is in restraint of trade under the Sherman Act and at common law, too, has it not?

Mr. BRANDEIS. I am going to come to that in just a moment. I am saying now how this question must strike the ordinary man. You come before a jury that knows nothing about the law, which has not been instructed in what is called the law of restraint of trade, and what will those men say if you propose this: "I have undertaken to manufacture these goods, or am growing them; I am putting up my pears in a particular way, or my apples, or my peaches, or my grapes in a particular way, and I am going to sell these at a definite price to the consumer, guaranteed, as they are, by my selection and my packing to be as represented. Now, gentlemen, I am going to put that on the market, and anybody who buys this package for 10 cents knows exactly what he is buying. Shall I be allowed to say at what price the purchaser shall buy, if he buys at all?"

The CHAIRMAN. You do not propose to compel anybody to buy the package?

Mr. BRANDEIS. I do not propose to compel anybody to buy it, but I say, taking that as the original proposition—

The CHAIRMAN. You do not propose to prohibit anybody else from producing something on the same line and putting his name on it?

Mr. BRANDEIS. Precisely; but here is a case simply of an article I have selected and I have to put it out. Now, I ask you—divorcing yourself from any knowledge that you may have of law or decisions—I ask you whether there is one human being with the ordinary sense of business fairness and decency about him, whether he be business man or a farmer or a laborer, who would not say, "Of course; why should there be any difficulty about that?" Nobody, I submit, who had not had some practical training or direction in the law, or what is supposed to be the law, would question that the maker or producer of the article might fix the selling price.

The CHAIRMAN. So long as the manufacturer or vendor retains any property interest in it he can control his rights by contracts anyhow, can he not?

Mr. BRANDEIS. So far as he has it in his physical control. The question on whether he retains an interest is really the question that is involved in this bill. But I say that is the way in which the matter must present itself to everybody not versed in the law.

The CHAIRMAN. I do not mean his pretended interest; I mean his real interest.

Mr. BRANDEIS. It is a question as to what is a real property interest. Now, Mr. Chairman, you are touching again upon the field of the law when you talk about a real interest. But I say when you look at it simply as a question of fairness between man and man, as a question of ordinary business practice, nobody could question for a moment that it was an unfair thing to do, if you have agreed to take goods and sell them for 10 cents a package to go out and sell them for less.

That, I say, is the natural attitude of man toward the subject of standard prices. How does it come that there is any question now about the right to so establish a standard price? How does it come that Mr. Stevens is now to introduce a bill on this subject? It is, Mr. Talcott, as you have said, because the Supreme Court of the United States has said something in regard to the subject. It has said that such a contract is in restraint of trade both at common law and under the Sherman law. It has said so, but not unanimously. It said so recently by a vote of 5 to 4 in the *Sanatogen* case. And the fact that it has so declared does not prove that such a business practice actually does restrain trade. It proves only that such is the law of the Federal courts until that court reverses its decision or Congress, which has the supreme power of declaring the law in this respect, says otherwise. In other words, the mere fact that the Supreme Court has rendered its decision does not foreclose the matter. Why? Because it is Congress which must ultimately determine questions of economic policy in matters of interstate commerce.

Other courts have considered this subject and considered it very fully and repeatedly, both in this country and in other countries; and these other courts have reached a conclusion directly opposite that declared by the majority of the Supreme Court of the United States. The Massachusetts Supreme Court had occasion to consider this subject very fully; and the Massachusetts court declared such contracts valid. The Court of Appeals of New York has found the same way. So has the Court of Appeals of Kentucky and the Supreme Court of California. And very recently and since the decisions of the Supreme Court of the United States, the Supreme Court of Washington, in an excellent opinion, held such contracts valid. The law of restraint of trade was developed in England; but the English courts have repeatedly declared that such contracts were valid and in harmony with the public policy of the nation.

This is what the highest English court said recently when a contract fixing the resale price came before it:

"Why should not Messrs. Elliman be at liberty to fix the price in that way? Nobody has argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell below a certain price. It is said that it is in restraint of trade. In one sense it is; but it is just as much and no more in restraint of trade for Elliman & Son to say that they will not sell at all. It seems to me that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman."

Then, referring to some of the restraint of trade cases, he added:

"But this case seems to me not to fall within any principle or exception. I do not think it is touched by the authorities at all. It is merely a question whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy; but that phrase merely embodies, for the present purpose, the great principle of restraint of trade, and to say that it is to prevent Messrs. Elliman from exercising their own discretion seems to me to be applying a well-settled principle of law to facts to which it can not have any possible application. This it seems to me is not a case that falls in any proper principle of restraint of trade."

Not only is that the English law, but in other leading countries of Europe, for instance, Germany and France, the same rule is recognized. And in Denmark, a country of small population, of small traders, and particularly of agricultural producers, where there is no question about the legality of the practice



of establishing standard prices, the legislature enacted a law providing penalties to enforce the observance of such standard prices.

Mr. ESCH. In that connection I saw a newspaper item giving a decision of the Supreme Court at Leipzig, Germany, affirming a decision of the inferior court, holding, briefly, this:

"Agreements among industrial agencies are permitted if entered into for the purpose of preventing unrestricted competition and the undesirable results of price cutting.

"A combination is legal until it can be shown that it has been made for the purpose of obtaining exorbitant prices, or that it has been planned in order to mislead the parties placing the order, or to stifle the healthy and natural development of an industry."

Mr. BRANDEIS. That, I think, Mr. Esch, goes beyond anything that we have under consideration here. It draws exactly the distinction which I think our Supreme Court of the United States failed to have clearly in mind when it rendered these fixed-price decisions.

The CHAIRMAN. What authority was that?

Mr. ESCH. The decision of the appellate court in Leipzig, Germany, affirming a decision of the court in Berlin.

Mr. BRANDEIS. That goes further and raises a question distinct from that under consideration here. We have a question not of combination in any sense of the word. Our question is, What may the individual do where there is no combination? Now, see the proposition. As this English court says, I, the producer of this article, the packer of these peaches, I may say perfectly definitely I will not sell these to anybody. Or take the case of the baker of bread, the baker of "Tip-Top" bread, who says: "I undertake not only to bake bread properly but to pack it properly; to pack it in oiled paper; to sell in loaves not only a known weight and quality, but in a known condition; in a package which is both sanitary and attractive; and I establish my price at 10 cents, and that price shall be uniform to all. I determine to make the price and the quality of the bread stable regardless of the fluctuations in the price of wheat. Whether wheat goes down to 80 cents or goes up to \$1.40, I propose to sell my bread at 10 cents a loaf. I sell it from my bakery, and my business grows. Nobody questions my right to fix 10 cents as the price and to say that I will always stick by 10 cents no matter what the change in the market is, whether wheat goes up or down; no matter whether labor goes up or down. My business prospers because people want my bread and like the way I present it to the public. The guaranty of my name on it is worth something to them. Although dealers offer other bread for 8 cents a loaf, they buy mine. My business grows and there are people in other parts of the city who want my bread. After undertaking to deliver it for a while in other parts of the city with my own wagon, I conclude that it will be better to establish branches. I establish five such branches and I adhere to the 10-cent price. No human being questions my right to fix 10 cents as the price at those five branches just as it is my right to fix that price for goods sold at my bakery. It takes considerable capital to establish those branches, but I have saved money enough for that purpose. Then there comes a wider demand for my bread from neighboring cities. I am not able to establish more branches, so I undertake to secure so-called agencies—dealers who will sell my bread on commission. I establish five such agencies, and still I adhere to 10 cents as the price at which my bread must be sold. Everybody admits my right to do this under the law; that is, my rights are the same in respect to fixing 10 cents as the selling price, whether I sell from my bakery, from a branch, or from an agency. But, if I lack the capital or organizing ability to establish branches or agencies, or prefer to retail my bread generally through dealers, the right then to insist upon the standard selling price is questioned. If I should say no, I will sell not only to a restricted number of people but to anybody in this whole part of the country who chooses to deal in my bread and I will let anybody sell my bread who wants to do so. But anybody who wishes to sell it, who will pay me my price of 7½ cents a loaf, and will agree to retail it at 10 cents a loaf can have my bread on equal terms. Then, the law comes in and says, according to the majority decision of the Supreme Court, it can not be done. And the court in saying it can not be done does not apply any underlying principle of law, but expresses merely its opinion that such agreements are against public policy and that it believes Congress intended to prohibit them when it enacted the Sherman law. I submit most respectfully that this is a most erroneous supposition, that there

is nothing against the public interest in allowing me to make such an agreement with retail dealers, since if I had money enough I could accomplish the same result by establishing any number of agencies all over the country. The denial of the right to establish standard prices results in granting a privilege to the big concerns; a discrimination in favor of the rich and powerful as against the small man; for the concern with large capital, as the powerful trusts, can secure adherence to the standard price while the small manufacturer or producer can not. The small man needs the protection of the law; but the law becomes the instrument by which he is destroyed. The rule laid down by the Supreme Court is inconsistent with the business policy adopted by this country and recently confirmed by the Clayton Act and in the Federal trade act—the policy of regulating competition. The decision must be explained by the fact that the court did not fully understand the practical application of these rules to the trade facts. The public interest clearly demands that price standardization be permitted; and it demands it in the first place in the interest of the small man.

Mr. O'SHAUNESSY. The small manufacturer?

Mr. BRANDEIS. The small manufacturer, the small producer, and the small retailer. Ultimately also of the consumer, as I will undertake to show; but primarily in the competition of the small man as against the big one. The big man needs no protection. The rule, as it is laid down by the Supreme Court, is a sword in his hands. Just see the situation.

Mr. MARTIN. If the small man and the big man can vote to fix the price, how is the public interested, whether the manufacturer be large or small, if you advocate the ability to fix the price in either event below which consumers will not buy?

Mr. BRANDEIS. Yes, sir.

Mr. MARTIN. How is the public interested whether the manufacturer is big or small, if you are advocating as to both the ability to fix a price below which the consumer can not buy?

Mr. BRANDEIS. When you get the real big man he can always help himself.

Mr. MARTIN. But here is the question—

Mr. BRANDEIS. I understand; I am coming to that. I want to answer the question in full, and I am merely answering a part of it when I make the statement that I did. We need not take any trouble about the great big man except to do justice to him; and that is not so much on his account as on our account; because if we do injustice to anybody we are injuring ourselves and not only him. We must see to it that the big man is accorded justice; but we need not trouble ourselves much about protecting him. The big man can fully protect himself. The Standard Oil Co. had no difficulty from cut prices. The Standard Oil Co. can establish its agencies throughout the world. It did, as a matter of fact, sell through its agencies and from its wagons all over the world. You could find them in Egypt and in Palestine as well as in Massachusetts and other parts of the country. There is no difficulty in that respect. They can maintain prices, if they see fit, through their agents.

Mr. MARTIN. Do you favor their ability to fix prices below which no one buy?

Mr. BRANDEIS. No; their ability to fix prices is an ability which adheres in the power, not in any law. It inheres in the rich man, for he has the power to establish agencies. This is done by a large and powerful concern, the Ford Motor Co., which is not a trust. After the Supreme Court rendered its decision the Ford Motor Co. was advised that its contracts with dealers all over the country were invalidated. That did not seriously disturb the Ford Co. It merely changed its business methods. That great concern, earning \$25,000,000 a year, was in a position to create agencies. It had ample capital to carry all the stock in trade required; it could create all the agencies it pleased; it could therefore carry on the policy of standard prices in spite of the Supreme Court decision.

Mr. DOREMUS. Are you able to explain, Mr. Brandeis, the method by which the Ford Co. changed its business after the decision of the Supreme Court?

Mr. BRANDEIS. Yes; I think, in a general way, I can. I am not familiar with the details, but what they did was presumably this: Before the decision any dealer anywhere could buy the Ford car under an agreement for resale at established prices. The dealer became the owner of the car and was bound, as other people are bound, to observe the terms of the agreement under which he purchased. The agreement required that the car be sold at the standard price. The car was sold to dealers, I think, at 85 per cent of the price at which the dealers were bound to sell it.

Mr. DOREMUS. The title passed—

Mr. BRANDEIS. The title passed—

Mr. DOREMUS. And the dealer was obliged, under the terms of the contract, to sell the car at a certain list price?

Mr. BRANDEIS. He was compelled to sell at the list price.

Mr. DOREMUS. That was the situation?

Mr. BRANDEIS. That was the situation, and in respect to hundreds of others in this country.

Mr. DOREMUS. You say that is the situation now?

Mr. BRANDEIS. No; now, the Ford people, in order to bring themselves within the rule laid down by the Supreme Court, do not sell necessarily to every dealer, but make certain dealers their agents in a particular territory. Consequently, instead of having a business reasonably free, where they could fairly deal with anybody who was reasonably trustworthy and entering into a contract of sale with them, the Ford Co. were forced to adopt the policy of establishing agencies, and that involved the Ford Co. retaining title to the machines in stock. A rich concern could do that. It is merely a question as to whether the change of method might involve inconvenience or expense.

Mr. MARTIN. Of course, the question as to whether or not it is good policy for the price to be fixed below which the consumer could not buy, and if you are advocating a policy that the price ought to be fixed rigidly and kept there, we are not much interested as to whether it is a large or a small dealer.

Mr. BRANDEIS. I think that fails to take into consideration what public interest means.

Mr. MARTIN. I think that is the ultimate question.

Mr. BRANDEIS. That is one question. The public interest is made up of a number of things. It is made up, in the first place, or in the last, whichever you put it, of the consumer, that he should get a good article at the lowest price that he reasonably can, consistently with the good quality and good business. That is his interest as a consumer, that he should get a good article at a low price, and, conveniently. There should be no doubt that he gets value and there should be no doubt that he will be able to get it without putting himself to extraordinary trouble in getting it. That is the consumers' interest. But there is another interest that the public has, and that we should look out for, namely, the interest of the rest of the public, the dealer and his clerks and the producer and his employees. We are all a part of the public and we must find a rule of law that permits a business practice which is consistent with the welfare of all the people.

Mr. O'SHAUNESSY. Selling under the price that the manufacturer establishes, how does that interfere with the manufacturer, the employee?

Mr. BRANDEIS. It is a little difficult to answer several questions at one time, but I will undertake to show how it injures each of these persons, first the manufacturer, as you have asked it, then the retailer, and then the consumer.

First, take the manufacturer or the producer, because the result is exactly the same whether it be a grower or a manufacturer who is putting the article on the market. He undertakes to create a value and that value consists in three things; indeed, of five: First, in the making of a good article. I mean not only in the sense of it being good in quality, but an article which meets a need which meets the desire of the people. That is one thing. The next thing is that that article should be known, because it may be ever so good, but if it is not widely known it will not do him or the world any good. And the third is that the article shall not only be known, but shall be known as being worth the price at which it can be had in the community. There is a fourth requirement. The article to become very valuable should not only be known and known to be worth the price, but that it should be easily accessible to possible purchasers, for the public will not make a sacrifice of time and effort in order to get it. And I might add a fifth requirement, that a man in buying it may buy it lightly; that is, without having to go through an agony in making up his mind whether when he takes the article he, at the price at which it is offered, is going to get his money's worth.

Mr. DECKER. What is that fifth one?

Mr. BRANDEIS. That the man when he sees the article, when he considers buying it, does not have to go through a mental agony as to whether the price he is paying is too much or not too much.

Those things are desired from the manufacturer's standpoint. When he undertakes to make an article, the first consideration is quality. That, as everyone knows, is something which is not easily arrived at. In very many businesses and very many products it is an extremely difficult thing to make a

product which is not only good, but uniformly good, and in very many branches of manufacture it requires years before they can get a standard article. In some businesses, for instance, the seconds will form 80 per cent of the total quantity manufactured. In other instances the manufacturers find it impossible to secure uniformity, and often success or failure depends upon securing uniformity. So any man who undertakes to produce an article which is to be sold to the community naturally desires to create an article which will be uniformly good as well as of the character which he thinks the public wants.

Mr. O'SHAUNESSY. You spoke about the agency of many of the—

Mr. BRANDEIS. I am coming to that later.

Mr. O'SHAUNESSY. Will you just permit this question? Is it because the price was varying through these trade cuts that had been going on through an agency?

Mr. BRANDEIS. There are various reasons.

Mr. MARTIN. The price is so fixed that he could not have any competitive difficulty in the situation with it?

Mr. BRANDEIS. I am coming to it.

Mr. DECKER. Take those five points, one at a time.

Mr. BRANDEIS. I will do it. I shall take this first point. He is trying to get quality. We will assume he ultimately gets quality and he adopts that quality as a thing that he proposes to give to the public. Now, one of the great elements of Ford's success is that he strove, unlike other people who are making many different variations of machines—Ford strove for his particular three machines, and put all the mind he possessed to the perfection in those lines, and making the uniform product. The second requirement is of making the product known. Making it known means advertising it. In a small community the baker makes his bread known to his immediately neighbors. Then he begins to advertise and his wagon goes out, and the reference "Tip-Top" bread is seen and other advertising makes it more widely known. It is essential that in some way the article and its merits become generally known.

The next requirement is that the article be known to be worth the price. He fixes a price, and that is an act which is wholly the act of the manufacturer, just as the selection of the ingredients are the act of the manufacturer, and the determination of the quality to be presented to the public. It would be perfectly conceivable for a manufacturer to make his goods of several different qualities. Nearly all kinds of goods could be made of a great number of gradations of quality, ten or even a hundred; but some manufacturer says, "I undertake to make this quality," and he says likewise, "I undertake to make this quality to sell at this price—10 cents. Somebody else could make a similar article for 8 cents, for 9 cents, or for 10 cents, 11 or 12 cents, but I choose 10 cents."

That is an act of judgment; he makes the decision believing that in the long run the article of this quality and price will meet the public demand. If he makes a mistake in judgment either as to quality or as to price, he runs the risk of not being able to sell his article. He may find his price too high, or he may find that the price is right but that he must give more for the money. Take the Kellogg corn flakes. They fixed the price, and later they came to the conclusion that they ought to give 50 per cent more for the money. That was an exercise of judgment, and ordinarily nobody can exercise such a judgment as well as the maker or grower. At all events, it is he who must bear the penalty of any error of judgment. And there is just as much reason for allowing the maker to establish the selling price as there is for letting him decide the quality of the article to put upon the market.

Now, having determined price and quality and having made the article known, the next thing to do is to make the world understand that that article is worth that price. See what that means. Every transaction by which you sell an article involves a trade. The old idea of bargaining was that one man got the better of another. A good bargain meant a transaction by which one had gotten something for less than it was worth. And all the haggling you find in oriental countries, and which you find to a certain extent in every country, means merely that one fellow is trying to get the better of another. Under those conditions a bargain is an equation and two unknown quantities. The extreme of such bargaining was found in the era of barter, when men did not have any fixed medium of exchange, where they traded one article for another. Then there was the delight of haggling. Each side had his article; neither knew what the other's was worth, and they swapped.

A great advance was made in the trade when money became the medium of exchange. Then you cut in half the uncertainties in bargaining. You knew what the money was worth, but you were still uncertain as to the value of the article purchased. We have become so accustomed to the fixed standard in money that trade is disrupted by any depreciation of the currency or when, as with irredeemable paper currency, the value varies from day to day. Now, the tendency of development in trade is to eliminate uncertainties in value.

Many of you can remember when the one-price store was introduced. A. T. Stewart introduced this great advance. Then, for the first time, a man could go into any store with the reasonable assurance that he was not obliged to depend upon his own bargaining capacities; he would know that the hoodwinking would at least not be individual, for he could confidently say, "At all events, if I do not get value I at least get as much for my money as anybody else who buys a like article; and there is a good chance of my getting value, because the dealer who puts the price on this article knows that he probably couldn't fool all the people, and perhaps won't try to fool any."

Still there remained in the one-price store the doubt whether the article offered was of good quality, because a paper of pins of different makes might be worth very different amounts. They may be good pins, they may be medium pins, or they may be poor pins; and 10 cents for a paper of pins of a known make may be cheap or dear for a paper of pins. But if I pay 10 cents for a paper of pins of a known make I may know the quality I am getting, whether the price is right or not. So the branded article came to be adopted and the elements of uncertainty in trade were further reduced.

The step fixing a standard price was the next step. The maker of a trademarked article of recognized value concludes to establish his market by standardizing the price. The uncertainties are shifted from the consumer to the maker, who assumes the chances of rise and fall in the cost of production. Thus the rise in the cost of wheat does not to-day affect the consumer of shredded wheat; and this is true likewise of many other branded food products, although the raw material has increased greatly in cost. Why was no change whatever made in the retail price of these articles? Not from humanitarian motive, but for the very simple reason that it was so important to the manufacturer to have his known article remain of a known value that he was willing to bear the loss incident to the rise in the cost of the raw materials.

And the next essential of success is that the article should "be sold everywhere." It must be made convenient for the purchaser to buy; and for two reasons: In the first place we do not remember the article or know that we want it unless we see it, for the mind does not carry much in the memory, and in the next place few will go to great exertion to procure one article in preference to another of like character. If we can buy Tip-Top bread conveniently we will do so, but if we have got to walk a quarter of a mile to get it we are apt to put up with some other make.

And finally comes the fifth requirement. In order that the public may be free buyers there must be removed from the mind of the potential purchaser the thought that probably at some other store he could get that same article for less money. Every time a doubt arises in the mind of the potential purchaser the chance of selling him is lessened; each such doubt reduces the percentage of possible sales and the value of the reputation built up by effort and expensive publicity.

The thought that perhaps if one went to some other store or waited until the next day he could get an article 1 cent or 10 cents cheaper defeats many a sale.

MR. O'SHAUNESSY. Do the manufacturers claim that that limits the sales?

MR. BRANDEIS. I was just going to show you why they claim it, and I think the evidence is very clear. Let me show what happens. The manufacturer creates by his efforts and expenditure of money a reputation; for instance, the public knowledge that an Ingersoll watch and a dollar are convertible terms, or Uneeda Biscuit and 5 cents are convertible terms. What happens? A great department store opens with 80 departments, selling 5,000 or 10,000 different articles. It wants to bring people into their store. That is of prime importance. They know if people are brought into the store and if shredded wheat, which can be had at 2 cents below standard price, is up in the fourth floor they will sell besides many other things. On the route through the store until the shredded wheat is reached are spread a series of baits of just the kind of things the woman who wants shredded wheat will probably be tempted to buy; and

as she proceeds through this highway of temptations to or from the shredded wheat counter she is pretty sure to buy many different things which she had not intended to purchase.

Mr. HAMILTON. Suppose she takes the elevator?

Mr. BRANDEIS. She can not get to the elevator without passing a series of temptations. No proper manager will permit that.

Mr. O'SHAUNESSY. It provokes trade on the other floors?

Mr. BRANDEIS. It not only provokes trade on the other floors, but the display is so arranged that that person likely to be in search of this particular package will be shown many other articles she is likely to want. Some of the very best minds in the business are devoted to study of such situations. Nothing is left to accident. These businesses are run with the certainty of engineering. The sales are planned most carefully weeks and sometimes months in advance. As I said, it is first importance to get people into the store. Once get them there through the advertised bait and the display will do the rest. But there is another thing besides getting them into the store which is important. You must create in the mind of the possible purchaser the feeling that she will get more than her money's worth. How can you do it? Here are a pair of socks, and here is some black silk; and here are different articles of underwear, and here are combs, and a hundred different articles, any one of which you think that person may want to get. Offer them at any price you like. You may fail to convey any impression that they are cheap. You can get a comb for anywhere from 10 cents up to \$5. Your underwear may cost 25 cents or \$3.50. The fact that you are offering this underwear, this comb, these gloves, or this silk ordinarily at a small price does not prove it is a low price. You mark it reduced, and the possible purchaser still doubts; for he lacks ability to compare it with known standard. The effective way to create in the purchaser's mind the impression desired is to provide for comparison with a known standard. "Here is something of a known value. This Kellogg Corn Flake is worth 10 cents; for I have bought it for years at that price." If a woman finds she can buy it at 8 cents, that tends to create in her mind the impression that everything along the path of temptation may be had at like bargain prices. That is the reason why a department store will use Kellogg's Corn Flake at 8 cents or the Ingersoll watch at 67 cents as a "leader"—or, rather, "misleader." And what is the result to the manufacturer?

It ruins his reputation. Why? Because soon there is created in the mind not only of those who purchased at such bargains but of hundreds and thousands of others who never go to that store at all but who read the advertisement a doubt whether the Kellogg Toasted Corn Flake is really worth 10 cents a package. The thrifty housewife says to herself at once: "If this department store can sell it for 8 cents, then I have been paying for years 2 cents more than it is worth, and she is led to stop using it. Thus the reputation of an article is injured; the reputation of the man for dealing fairly with the public. By cutting the price it is made to appear that the article could be sold at less than the standard price; but, as a matter of fact, the dealer is selling it at a great loss, because that Kellogg Toasted Corn Flake which is sold at retail for 10 cents is sold to the dealer at, say, 7½ cents, and by no human possibility could the article be sold at retail at 8 cents without involving the dealer in a loss on the particular transaction.

Mr. TALCOTT. That is an oppressive and unfair method of competition, is it not?

Mr. BRANDEIS. It is not only unfair, but it is in effect a slander of the reputation of the article.

Mr. TALCOTT. Then why can that matter not be treated by the Federal Trade Commission?

Mr. BRANDEIS. I will take that matter up later, Mr. Talcott. I will take it up later as to why it can not.

I want to consider now the answer to the question that was put to me, why price cutting damages the manufacturer. I say in the first place it affects his reputation, and if persisted in will ruin the reputation of the article with the consumer by creating the impression that the price fixed was an exorbitant price, and that the article was not worth what was paid for it. But price cutting does more than that to the manufacturer. See what the effect is. This department store, which is selling that article, is only one of many customers. Large as the department stores are, they do a very small part of the total business of the country in many of the articles which they sell. This is true, not only of the country,  $\pi$

of any community. For instance, only a small part of the sale of Shredded Wheat, or Kellogg's Toasted Corn Flakes, either in the city or the country as a whole, are made through department stores. What happens is this: 30,000 or 50,000, and sometimes even 100,000 people, go into a department store in a single day, but many more read the advertisements. Of those who go in or who see that advertisement very few will buy the Kellogg Toasted Corn Flake at 8 cents, but many will say to themselves: "I always pay 10 cents. My grocer over there must be overcharging me." And they begin to say, "Well, I am not going to buy corn flakes from him." And they stop buying corn flakes. This neighborhood grocer is then put in a position that if he wants to sell corn flakes he must reduce the price down to 8 cents; and every time he makes a sale at the reduced price he loses money. I mean the expense to him, added to the invoice cost of the goods, exceeds 8 cents.

Consequently, he is put to this alternative: "Either I have got to stop selling corn flakes or I must sell it at 8 cents at a loss," and he concludes to stop selling it. The manufacturer loses a part of his trade.

Then the manufacturer is in this situation: Corn Flakes was used as a leader, as the mere bait, by the department store. It sold an insignificant percentage of the Kellogg product. The department store discontinues selling the article soon, for it ceased to be an effective leader, and in the meanwhile the manufacturer has lost the small retail dealers as well as customers. But this is not all the harm done by the price cutting. Price cutting blackens the reputation of the manufacturer by making the consumer believe that the article was not worth the price ordinarily charged; but it also blackens the reputation of the retail dealer. When this department store sells the Corn Flakes at 8 cents, which the neighborhood grocer has always sold at 10 cents, his customer thinks he has found the grocer overcharging him on one thing and assumes that he has been overcharged in the other things. The result is that not only the trade in Corn Flakes but the other trade of this small grocer is damaged. People lose faith in him, although in fact he has been absolutely fair. He has been fair in living up to his agreement with the manufacturer and fair with his customer, because these standard prices are usually fixed at amounts reasonably near their actual value. As a rule standard prices are not exorbitant. The reason is simple. Nearly every standard-priced article is a competitive article. Competition is the automatic price regulator. Take Kellogg Corn Flakes. There have been 107 cereals either now or formerly competing with the Kellogg Corn Flakes. There is ordinarily no possibility of charging more for a standard article than it is "worth" in the commercial sense. If there is, the whole law of competition upon which American business rests is unsound. Standard prices tend to create competition.

Mr. DECKER. That is a pretty broad statement there, and I should like to ask what you mean. Let us take your corn flakes—and suppose there are 107 brands of cereals. If I had the capital to do the advertising properly in the Saturday Evening Post, and in Collier's, and in all the important weeklies, could I not go out and sell a brand worth one-third less than the other brands, and sell it just about as readily as the others?

Mr. BRANDEIS. Not for long. You would be a loser in any long period. You could do it for a little while, but you would not get your money back. That is the universal experience in business. This idea that advertising enables a man to put out an unworthy article through public advertising—

Mr. DECKER. It would not mean to be unworthy; it would make people fat, and nourish them, and all that, and still would not cost as much as one of these other articles. What I am getting at is this: Is not this publicity that you have spoken about the ability to fix the price all along the line; does it not give a man an awful power who has the capital? In other words, does he compete on the merits of his article?

Mr. BRANDEIS. I think he does compete on the merits of his article.

Mr. DECKER. To a certain extent—

Mr. BRANDEIS. As long as there is no monopoly. Of course, if there is a monopoly we have to deal with another problem.

Mr. DECKER. Does it not depend more on his organization and his publicity than on the merit of the article?

Mr. BRANDEIS. His absolute success, the success of any man in business, depends ultimately upon his ability and upon his having capital enough to utilize it, whether you have a standard-priced article or an article that is not. And of course there is plenty of money made all the world over on articles that are not standard-priced articles at all. Ability makes success, and the very able man is

going to make a success under any conditions conceivable. It does not make any difference what your law is. The able man will succeed by taking advantage of the defects of your law, if he is able enough and has capital enough. There is no question about that. The Kellogg corn-flake people did not have a tremendous capital at the start. The Kellogg corn-flake people made capital largely in their business. Ford did not have a tremendous capital. He had practically nothing when he started.

Mr. DECKER. Does not that leave the suspicion in the mind of the consumer that somewhere along the line these things have been sold for more than they are really worth?

Mr. BRANDEIS. It may leave a suspicion in some minds, but the suspicion is usually unfounded. There are times, undoubtedly, when you may say that a thing is sold for more than it is worth. But it is very difficult to say what a thing is worth. Now I, for instance, know mighty little about the intrinsic value of gloves. A brand of gloves is offered to me. I want quality, and I am willing to pay for it. I want also to know that I am getting my money's worth, without spending much time in trying to find out whether I am or not. I am willing to pay also for that assurance, and the standard price gives me, on the whole, such assurance. Reputation is something a man is willing to pay for. You say that this thing A is actually as good as this thing B which sells for a little more, but A is not as good for me, because I know the value of B and can't ascertain the value of A without a trial, which I may be unwilling or unable to make.

The CHAIRMAN. I do not wish to disparage any of these cheap cereal foods, but have you ever carried a package of corn or wheat to the mill and had some real pure genuine grits or cracked wheat made that were fit to eat? If you have ever done that, you will cease to get lost in the comparison with these cheap substitutes.

Mr. BRANDEIS. They may be cheap; but we who live far from the mills must perforce accept them in lieu of something better.

The CHAIRMAN. What I want to ask you is, Is there anything in your law to curtail our liberty to resort to those good, old-fashioned products of the mill?

Mr. BRANDEIS. Nothing whatever. The thing I am contending for, Mr. Chairman, is the liberty which you love so much, and I want to preserve it to you and to the rest of us, the liberty to deal as we please.

Mr. HAMILTON. It occurs to me that another element enters in there. There are certain people who buy a Knox hat or a Dunlap hat, or a safety razor, as my friend suggests—they buy a certain brand because that has been advertised and it is stamped as being of a certain quality in their minds. A man says this is a good hat. My friends know it is a good hat, and I am wearing a good hat, and I know it. There may be just as good hats on the market for \$3 as the hat you are paying \$5 for, but there is that inclination, and we are all of us more or less affected by it, which leads us to insist on buying the well-advertised \$5 hat.

Mr. BRANDEIS. I think that is absolutely true. I am getting value and getting a little reputation myself through wearing a \$5 hat.

Mr. HAMILTON. You are getting all the value there perhaps because of the difference in the price between the \$3 and the \$5 hat?

Mr. BRANDEIS. I am. I feel that way because I have a Knox hat right here.

The CHAIRMAN. That differential in excess price is not unearned increment, is it?

Mr. BRANDEIS. No; it is earned.

The CHAIRMAN. That is the good will of your business?

Mr. BRANDEIS. Yes, sir; precisely.

The CHAIRMAN. Which you have built up and which you seek further to build up by this legislation?

Mr. BRANDEIS. Precisely.

Mr. HAMILTON. That is the result of diligent advertising largely, is it not?

Mr. BRANDEIS. No; not altogether. It is partly so, but the fundamental proposition is you have got to have something of value. If you have something that is not of value the more you are known to the world the worse for you. The man who has not a good thing is the man who ought to sell his goods unbranded; and, as a matter of fact, he does sell them unbranded, and this is largely true of the stores that sell at "special sales" or "bankrupt sales." Look at the goods sold by auction on Pennsylvania Avenue and in similar places in other cities, and you will be sure to find that most of the goods sold are unbranded.



Mr. HAMILTON. A while ago an incident occurred before the Ways and Means Committee; the chairman of the committee, I believe, had a \$5 hat, and a dealer or a manufacturer of hats was on the witness stand and this hat was shown to him, and he stated that the hat could be bought for less than \$1.25. The hat was well advertised, however. You speak of value. We have often the advertised and the actual values.

Mr. BRANDEIS. The question of the intrinsic value and of the actual value. The actual value of two articles may be just the same. The actual value of two pieces of land may be just the same, but if you prefer to live on Broadway rather than on Market Street in some city or other, the land on Broadway is the land that is worth more to you, and the value, take it in a Knox hat, is in part the distinction that comes with the Knox hat.

Mr. DECKER. There is not much in distinction, but take a shoe or a Knox hat; for instance, I have had reputable shoemen tell me they can have just as good shoes as Hammond's made—

Mr. BRANDEIS. Suppose they can?

Mr. DECKER. Here is the danger. You are passing a law that gives me a right to advertise my article and fix the price clear down the line. His power of capital makes it impossible, almost, it seems to me, the danger of it, at least, of a merchant going and having a shoe made just as good as Hammond's and selling it to the consumer without the consumer having to pay for all that advertisement.

Mr. BRANDEIS. Just see that situation. I will reserve an answer to that, if you will repeat it later.

The CHAIRMAN. The trouble with our colleague, Mr. Decker, is he does not seem to know that what a man does not know does not hurt him.

Mr. ESCH. This Stevens bill protects branded and trade-marked articles?

Mr. BRANDEIS. Yes.

Mr. ESCH. Have dealt almost exclusively with the manufacturer?

Mr. BRANDEIS. Yes.

Mr. ESCH. I want to present another phase. The jobbers in increasing degree are purchasing now the entire outputs of factories—of canning factories—and they put their own brand—trade-mark—on the products. The individual manufacturer can not even place his name upon that label, nor the place of its manufacture. The effect, therefore, is that the individual canners and manufacturers of the articles purchased by the jobber have no incentive to increase the quality—no incentive to develop a trade of their own outside of going to the jobber, and hence the effect would be depressive upon the individual canners of the whole country.

Mr. BRANDEIS. I think that is absolutely true.

Mr. ESCH. Is that a tendency we ought to encourage?

Mr. BRANDEIS. I think what we ought to encourage by every means is to give value to what the individual puts into his product, and whether it be the canner or the expert selection by the jobber, it makes no difference which. For instance, take the tobacco business; the ability to select good tobacco is almost as great or greater an art than that of growing good tobacco. The man who has the capacity to pick out good cigars and good tobacco is a man who is performing a very important function for the community. That man, if he undertook to sell under his own name cigars, Havana cigars or American cigars or whatever they may be, ought to have a right to put out that cigar and to say: "This is the cigar that John Smith selected." I, who know nothing about tobacco and who want to buy a good article, can go and buy John Smith's article because of his reputation.

Mr. ESCH. Yes; but here is the jobber buying the output of a dozen canners located in four or five States, but they are all one brand and all sell at one price. There must, of necessity, be differences in the quality of the output of those several canneries.

Mr. BRANDEIS. I think there ought to be the perfect possibility, as there is under the trade-mark law—there ought to be the perfect possibility in regard to each one of those things that are sold, if they are sold to him, for him to say, "There are being sold at not more than a certain price, or at a certain price," but if I am the canner and I undertake to say that I, who make this article and undertake to put it out, I do not want to be confined to selling it over my counter or my little shop here; I want to be able to sell this all over this city, all over this country. I ought to be able to say that I choose to sell it in this way. I am not hindering anybody else from making similar goods or selling a similar article under such conditions as he chooses.

Mr. HAMILTON. Have you ever known of some dealers who advertise a cigar and get it well under way, then the quality deteriorates?

Mr. BRANDEIS. I have.

Mr. HAMILTON. And then the dealer makes a little more out of the cigar than he did in the beginning?

Mr. BRANDEIS. Yes; and then he loses his trade.

Mr. HAMILTON. After a while?

Mr. BRANDEIS. Yes. But the point is here. When a man undertakes to establish a reputation, as the Ingersoll watch established it or the Uneeda Biscuit or a great many other of these articles, they get something of such value, if the law does not interfere with them, that they are bound as a matter of self-protection to guard it as a man would guard his reputation and life. By taking away that incentive we injure not only the manufacturer, not only the small dealer, but we are injuring the consumer also.

Mr. HAMILTON. But the difficulty is—

Mr. BRANDEIS. That men do not always live up to it?

Mr. HAMILTON. That is it.

Mr. BRANDEIS. Of course not. If we were all wise, we would not need any law. We would not need any criminal law, surely, because we would know that the wages of sin is death. We, however, need law as an aid to wisdom.

The CHAIRMAN. That is good in theory, but in our courts the smart fellows get out.

Mr. BRANDEIS. Well, in some States they do. We come to the case of the consumer. The consumer is interested in precisely the same way.

The CHAIRMAN. I want to ask you a question. Suppose these fellows who buy your breakfast food or any other goods—

Mr. BRANDEIS. Let us go on to something else now. We will take watches.

The CHAIRMAN. I suppose the reason they cut the price is because they want to sell it and think they make enough at the lower price?

Mr. BRANDEIS. They can not afford to sell it cheaper any more than the Standard Oil Co. could afford—

The CHAIRMAN. As I understand it, you sell a retailer stuff at so much a gross, the retail sale price being 15 cents a package; they pay you possibly 10 cents a package by the gross, or whatever it is. Then you catch them cutting that price and selling it at 12 cents a package. If you allow them to make too much profit, why not just raise your wholesale price to them?

Mr. BRANDEIS. That would be a very simple proposition if those were the facts, the real motives that actuated them.

The CHAIRMAN. They make a leader of them, do they, in order to sell something else?

Mr. BRANDEIS. Yes. Consequently they can afford to sell not only at the actual invoice cost, but in many instances they sell below the invoice cost. It is one form of advertising and they think it is cheaper advertising than any other. It is merely a question of advertising.

The CHAIRMAN. Is it usual for dealers to make a leader out of such articles as that? I thought they usually took some staple article and made a leader out of it?

Mr. BRANDEIS. You can not make properly a leader out of any article unless the price of that article is so associated in the public mind with the article itself that the man can see that the article is sold at less than he is accustomed to buying it at.

The CHAIRMAN. I have known them to take something the people are compelled to have, like sugar or white cloth, or something of that sort, and sell one dollar's worth for fifty cents in order to draw them to the store and then gouge them on everything else. I never heard of them taking these minor articles and making leaders out of them.

Mr. BRANDEIS. Sugar has been an article which dealers have used as a leader, because the price of sugar has been more or less well known and more or less steady, and therefore they have said: "Here, this being the usual price for sugar, my neighbor and all the people around selling it at 6 cents, I am going to sell it at 5 cents." But in order to have a really good and effective leader you have got to have something which has been well advertised and that strikes the mind as being cheap. You have got to have something, whether it be an Ingersoll watch or a Gillette safety razor, or Uneeda Biscuit or Kellogg Corn Flakes; it must, to be very effective, be something of that kind; although of course men change their leaders from day to day. But it must be in the public

mind, so that when the reader sees either an advertisement in the paper or an exhibit in the show window he is impressed with the fact of the reduced price.

Now, let us see how this affects the consumer.

Mr. O'SHAUNESSY. Before you proceed I had one question in mind. The price is cut in different places but I can not understand as yet how it affects the manufacturer, except as you say in his reputation. And in that particular I want to find out from whom the demand for this legislation comes, from the retailer or from the wholesaler?

Mr. BRANDEIS. That I am going into in just a moment. In the first place as to how it affects the manufacturer. It does so in blackening his reputation; and in blackening his reputation it reduces the ultimate number of consumers. That is clear, is it not? In the second place your ultimate number of consumers will be greatly reduced by reducing the number of opportunities to buy, would it not?

Mr. O'SHAUNESSY. That I do not know. That is what I am looking for information on.

Mr. BRANDEIS. Take it as a matter of fact here. Suppose there comes a question of shredded wheat biscuit.

Mr. O'SHAUNESSY. Is there any specific proof of the loss by any manufacturer?

Mr. BRANDEIS. Oh, yes; I may say that the evidence on this, the testimony of manufacturers going into this point at great length will be found in the proceedings before the Judiciary Committee, on trust legislation, and I will furnish to the committee a copy.

The CHAIRMAN. They sell it cheaper in a particular community—it varies in proportion to the population?

Mr. BRANDEIS. It destroys the trade. It also shuts up your sources of getting it. If in a city where there are 500 grocery stores, 400 of them cease to keep shredded wheat, there will be reduced not by four-fifths but by two-thirds perhaps the total amount sold. Some people will go to the few stores that sell it, but the great mass of people will not take the trouble to search elsewhere for the article. They will go into the store and buy Kellogg's Corn Flakes, if obtainable; if it is not and they are told that there is something "just as good," or grapenuts, or the like, the customer is apt to take it and avoid the trouble of going down town.

Mr. SIMS. Suppose in the city of Washington 200 places retail Ivory soap for 5 cents a cake, while some one of these, in order to make a leader, reduces that soap to 3½ cents or 4 cents a cake, a great many people who are used to that soap, who know it, will go to that store and get it because the others have ceased to keep it. Then, after a while all these others of the 200 stores, the 199, begin to use or keep some other soap, and although this one store may sell a vast deal more soap than it would have sold, the actual volume of soap in the entire city is vastly reduced, although the wholesale price is the same?

Mr. BRANDEIS. That is absolutely true. You could follow that up with this statement, that one store will not keep on selling that soap at 3½ cents. This store will quit it soon.

Mr. BARKLEY. Do you know of instances where that has happened?

Mr. BRANDEIS. These records show many instances.

Mr. BARKLEY. Can you mention some of them?

Mr. BRANDEIS. One was a soap, the Buttermilk soap. But you will find a very large number of such instances, and they are inevitable.

Mr. DECKER. If that soap sale depended on the merit of the soap do you not think the people would demand the soap? Is it not the psychological situation there that has been making that business, that Buttermilk soap, and maybe that Buttermilk soap has not been any better than some other white soaps?

Mr. BRANDEIS. You have got to bear this in mind: In the first place, when you talk about the necessities of life, the necessity of soap, if there are 100 different soaps there may be grades of difference; 10 may be just as good one as another; 10 may be better than the other one, or one may be better than the other 10; but there are gradations. There is not anybody who absolutely needs Buttermilk soap any more than he needs Sapolio, or any more than he needs Ivory soap. There are different degrees; but men, because a thing is good, do not have to have it.

Mr. DECKER. They will ask for it if there is enough difference between its value and the value of others?

Mr. BRANDEIS. If there is enough and they know it.

Mr. DECKER. Is not this the fact, that there is not much difference in the value of it?

Mr. BRANDEIS. No; there may be quite a little difference, but when you use the term "much" you are using something which is—

Mr. DECKER. Of course, there could not be much difference?

Mr. BRANDEIS. I say there can not be 5 cents difference; there may be one-half cent difference, or maybe one-fourth cent difference, or a difference that you can not express in money. I may like the particular odor of the Ivory soap better than I do of any soap, of Buttermilk soap, or of Fels Naptha, or something else, but I am not going to take an awful amount of trouble for it. There are other things I have got to consider besides the sense of smell, and consequently I am not going to go another block or two blocks to get it. And in this particular case which Judge Sims put, you take that case of this one concern, men who undertook to sell the soap at  $3\frac{1}{2}$  cents; they lose money at  $3\frac{1}{2}$  cents. They are perhaps paying  $3\frac{1}{2}$  cents for that soap themselves, or, if not, they are paying  $3\frac{1}{2}$  cents or paying 3 cents; the cost of doing that business is such that every cake of that soap they sell involves a loss of money, treated separately. The result is they will stop selling it as soon as it has not value for advertising purposes, and after a very little while the manufacturer will find his sales reduced through a contraction of the number of avenues of getting to the public. Finally, the market will be lost altogether, because the particular outlet remaining finds it no longer profitable to continue to sell at a cut rate. So a manufacturer may lose one market after another.

Mr. SIMS. The larger volume a manufacturer can market the smaller price he can sell that product at, is not that true?

Mr. BRANDEIS. Undoubtedly, as a rule.

Mr. BARKLEY. What you are advocating is that Congress pass a law permitting a manufacturer of every trade-marked and specially branded article, which may be made to include everything that is made, if it does not already, to fix one price at which the ultimate consumer must buy that article, it makes no difference how many hands it goes through?

Mr. BRANDEIS. Not "must buy," but "may buy."

Mr. BARKLEY. Would not that inevitably lead to the proposition that if the Government is to guarantee to the manufacturer his right to fix the price the Government must stand over him with a club to see that he does not fix the price too high, and would that not inevitably lead to the Government fixing the price of everything, because it had to stand over the manufacturer to see that he did not fix too high a price, and would that not make the Government go into the business of investigating the cost of manufacture and of labor and every other thing which went into the manufacturer's price?

Mr. BRANDEIS. Emphatically no, and I will tell you why I think so. In the first place I do not want the Government to guarantee anything in the sense that you speak of guaranteeing his right. I think you were not here when I called attention early in the argument to what seemed to me to be the situation. There would not have been any occasion to introduce the Stevens bill but for misapprehension by the Supreme Court of the trade condition and facts necessary to determine what the public interest demands. What is being asked for here is not any privilege at all; it is a measure to restore a right commonly enjoyed in the leading commercial States of this country, and the leading commercial countries of the world enjoy as a matter of course, and which was abridged in respect to interstate commerce by certain decisions of the Supreme Court. If a manufacturer or producer puts an article on sale in any of those States or Territories he can say, "I am going to market it on these terms," and provided he has not a monopoly he may legally say, "If you want it on these terms, you can take it; if you do not want it, buy some other article in competition with it," for the Stevens bill applies only to articles in which there is competition. In no proper sense can that right be spoken of as a privilege, unless the right to live and to be free be called a privilege. The Stevens bill seeks to restore, in interstate commerce, the right which a man has by virtue of being a free business man in the community.

Mr. BARKLEY. Are there any present restrictions upon his freedom?

Mr. BRANDEIS. Yes; there is this present restriction upon his freedom that the Supreme Court of the United States by a majority decision, has imposed, in the belief that it was a restraint of trade for a man to establish this standard price at which his article shall be sold in competition with others.

Mr. BARKLEY. He already has the freedom to manufacture what he pleases and sell it at what he pleases?

Mr. BRANDEIS. No; he has not; because a man is not selling an article in any proper sense until it reaches

Mr. BARKLEY. He is parting with his title to it, is he not?

Mr. BRANDEIS. I know; but you are suggesting what is a purely technical matter of law and not a matter of business. When you talk about parting with the title, you are talking something technical and using lawyers' language and not the language of the business man or the consumer. If I give you something and say, "I will sell you this article upon condition that when you sell it you will sell it at a certain price." I have not transferred the title unconditionally; only given you a qualified right to deal with it. If I sell you the article without any condition, then, of course, you have the right to deal with it as you choose. Why should not the manufacturer or producer in a competitive business, having no power over his customer except the power of persuasion, be allowed to say, "Here is the article I am producing. In fairness to myself, in fairness to other people who are buying this article, I am not willing to have you buy it unless you are willing to take it on condition that you will sell it at the same price at which others bind themselves to sell it. If you will not accede to those terms, all right; there is no trade." Now, if the customer takes the goods on those conditions, does not the law, fairness, and public interest demand that the customer should live up to your contract? That is really the question involved in the Stevens bill.

Mr. BARKLEY. Let us take two merchants, one living in a city of 100,000 inhabitants and another in a city of 2,000 inhabitants. The man who is in business in the city of 100,000 inhabitants pays \$100 a month, we will say, for his rent and pays \$75 a month for his clerks. The man in the city of 2,000 inhabitants pays \$50 a month for his rent and \$50 a month for his clerks. Your position is that if the man who pays \$50 a month rent and \$50 for his clerks is not willing to sell the manufactured article at the same price it is sold by the man who pays \$100 a month for rent and \$75 a month for his clerks—that he ought not to be permitted to have the privilege of selling that thing unless he is willing to make an agreement with the manufacturer in advance?

Mr. BRANDEIS. Yes, sir.

Mr. BARKLEY. Notwithstanding he might sell it at less and make all the profit he would be entitled to, and the consumer would get the benefit of the reduction in price?

Mr. BRANDEIS. As a matter of fact you have involved two or three elements which I shall have to trouble you to treat separately. In the first place the dealer has no right to buy my article at all if I do not want to let him have it. I have the full right to say that I do not care to sell it to him because his hair is white and I choose to sell only to men whose hair is black. Or I have the right to say to him, "I will not sell it to you because you live in the city of Kalamazoo." That may be a very poor reason, but I have the right to refuse even for a poor reason.

Mr. BARKLEY. I do not want to create a wrong impression, but I am not from the town of Kalamazoo.

Mr. BRANDEIS. It is a great honor, I think, because the town of Kalamazoo is a town which has shown very great business ability and enlightenment. I say the manufacturer may refuse to sell for any reason, however absurd that reason may be. But here the reason for imposing the condition is not absurd or arbitrary. He must consider his whole trade. Now, gentlemen, it may be or may not be that the dealer referred to by Mr. Barkley might, owing to peculiar condition, be able to sell my article at a lower price and yet make a profit on it, but, with the best of intent on his part and with the best of motive in every way in this whole transaction, I might be unable to afford to let him do it. It might not be fair to my customers in Detroit or Grand Rapids and would not be fair to customers in other parts of the country. They would say such price cutting would interfere with their trade as it would with my trade. Now, should I not be allowed to say in the exercise of my business judgment and in order to deal fairly with other customers that I must require observance of the standard price or withhold my goods? If the dealer Mr. Barkley refers to is a philanthropist and wants to give his customers a present of something, let him make the price lower on some other article which is not standard priced and satisfy his own conscience. But the manufacturer can not permit this standard price to be cut without injuring not only his own business but the business of many other men who are closely associated with him as retailers of his article. When you come to the other proposition and say you are denying this consumer an opportunity to make a good trade, I say you are not denying him that opportunity in fact; for in the long run consumers, taken as a

whole, will be injured also by price cutting. The price is cut on one article in the hope of making more money out of him in many others.

Mr. BARKLEY. And the merchant selling at 10 cents immediately becomes a philanthropist because he does not want the other to sell at 8 cents?

Mr. BRANDEIS. He does not become a philanthropist. The purpose of business is not philanthropy; the purpose of business is to give value. Business and philanthropy may go hand in hand, but as a rule we have to look to business first. It is not philanthropy, but fair play; it is manhood and honesty that demand for the American business man the right to establish for himself a standard price. The law should not interfere in matters of trades unless there is a commanding necessity for such interference. If the Kellogg Corn Flakes Co. or the shredded-wheat concern should undertake to make an agreement with some other concern to suppress competition, then under the Stevens bill the right to contract for a standard selling price would not exist.

Mr. DECKER. What difference is there between that and taking the Shoe Machinery Manufacturing Co., for instance? They were able-bodied men and free men, and they got some patents for the manufacture of shoes. By what authority do we stop them from making any kind of a contract that they see fit with the shoe manufacturers?

Mr. BRANDEIS. In the first place, we do not stop them from fixing the prices; but, in the second place, they are a monopoly. The Stevens bill draws with the greatest clearness this distinction. Where there is a monopoly or combination to suppress competition, the right which it secures of establishing a standard selling price is taken from the manufacturer or producer automatically. The Shoe Machinery Co. became a substantial monopoly not merely by virtue of its patents but by virtue of the particular control of the machinery situation so that no competitor could break in. But when you come to cereals——

Mr. DECKER. How did it get to be a monopoly?

Mr. BRANDEIS. It got to be a shoe-machinery monopoly by combining some 120 different concerns together.

Mr. DECKER. How was that done?

Mr. BRANDEIS. By buying up one after another until the final combination was effected.

Mr. DECKER. They bought all the shoe patents?

Mr. BRANDEIS. They not only bought shoe-machinery patents, but bought the various companies that made different kinds of shoe machinery, so they practically controlled the situation.

Mr. BARKLEY. That leads to a very interesting question which I desire to open. If that is true that this is a combination——

Mr. BRANDEIS. What is a combination?

Mr. BARKLEY. This shoe-machinery company of which you speak, and that 100 or 1,000 other different concerns that manufacture the necessities of life are combinations; if it is already admitted they are combinations and therefore control the output of product which they make, would this bill, if it passed, lead to a situation where they would control not only the output but the price?

Mr. BRANDEIS. I do not think it would have any application to them.

Mr. BARKLEY. And the public's hands be absolutely tied?

Mr. BRANDEIS. I think decidedly no; because with them the situation is exactly the opposite.

Mr. BARKLEY. Let us take a brand of stoves.

Mr. BRANDEIS. Yes; that is a very good illustration.

Mr. BARKLEY. A merchant wants to buy a carload of stoves, and he goes to the manufacturer or to the jobber and buys these stoves and the jobber says, or the manufacturer, "I will let you have these stoves for \$10 apiece wholesale, but I will not let you have them unless you sell them at \$20 apiece retail.

Mr. BRANDEIS. Whose stoves?

Mr. BARKLEY. Anybody's stoves.

Mr. BRANDEIS. It has got to be——

Mr. BARKLEY. It has got to be a stove of a special brand, and they have all that, because you call them various names. It may not be a trade-marked article, but a special brand. The merchant says, "I can sell this stove at \$15 and make all the profit I need in my town"; but the wholesaler says, "You can not have it unless you will sell it for \$20."

Mr. BRANDEIS. Yes; absolutely.

Mr. BARKLEY. Why is there any justice in that sort of law?

Mr. BRANDEIS. There is absolute justice, because this man has fixed at his peril this price because of general conditions.

Mr. BARKLEY. But he sells it to the merchant at a sufficiently lower price to let him make all the profit that he wants out of it at \$15.

Mr. BRANDEIS. Not necessarily all he wants, but all he can get. If he were a monopoly, he would be in danger of taking more profit than that was worth; but in all probability you would find there were 1,547, or twice, or three times, that many stove manufacturers in the United States.

Mr. BARKLEY. I think very easily, all combined. Then the courts, or somebody, must go into court to determine whether or not they are a combination, to determine whether or not this law will apply?

Mr. BRANDEIS. Why should they not?

The CHAIRMAN. The breakfast foods would get musty while you were waiting for a decision.

Mr. BRANDEIS. The moment you sue on your contract you have got a complete defense to that contract by saying you are a combination; you are a monopoly; it does not apply to you. Now, the man goes into court, and they may say, "Gentlemen, you may be one of that 107 different manufacturers who are actively competing with one another, but you can not have this right to protect your business." And the A B department store shall have the right to destroy your business. Why? Because they want to.

Mr. BARKLEY. That is one of the objects of this law, is it not, to keep them from buying from department stores and from mail-order houses?

Mr. BRANDEIS. No; not to keep them from buying, because you can not do that.

Mr. BARKLEY. To bring about a situation where they can not sell it to the people?

Mr. BRANDEIS. No; not at all.

The CHAIRMAN. Who is to be the chief beneficiary in this legislation—the manufacturer or the ultimate consumer?

Mr. BRANDEIS. Three classes of people.

The CHAIRMAN. All of them?

Mr. BRANDEIS. The manufacturer, or the producer, the retailer, and the ultimate consumer. I want to answer your question as to department stores.

The CHAIRMAN. You are not here solely in behalf of the ultimate consumers, are you?

Mr. BRANDEIS. I am here in behalf of the public, and I conceive that the public includes all of these classes of people, including Members of Congress.

The CHAIRMAN. Well, they need protection.

Mr. BARKLEY. I am not certain that the public looks upon it in that light.

Mr. BRANDEIS. I think they do.

Mr. BARKLEY. I mean in reference to Members of Congress.

Mr. DECKER. I have no desire to be personal, but we have asked the same questions of everybody here so we can get at the facts. I do not care whom you represent. If you are right I am for you, but sometimes it gives us an idea what is back of these things. I have been getting these circular letters about this Stevens bill. Who is back of this? Whom do you represent?

Mr. BRANDEIS. I represent myself—nobody else.

Mr. DECKER. Nobody else?

The CHAIRMAN. I was not more polite than Mr. Decker, but I knew you better than he did, therefore I put my question more adroitly; I did not ask you whom you represented, but who would be the beneficiary of this legislation.

Mr. BRANDEIS. Let me put it in another way.

Mr. DECKER. It is all right with me if you represent Morgan or not, or anybody else.

Mr. BRANDEIS. Unfortunately I represent only myself. I will tell you how I happen to be interested in this question. I will show you how I came to appear here. In 1912 Mr. Oldfield, then chairman of the Patent Committee of the House, told me that questions were coming up in the Patent Committee as to which he would like me to aid him in drafting some legislation bearing upon this subject. I had never given the subject of standard prices any consideration before, but I had given much attention to the trust problem generally; had testified before the Senate Committee on Interstate Commerce and the Stanley Investigating Committee, and Mr. Oldfield knew I was then working with Chairman Stanley. I told Mr. Oldfield I should be glad to aid if I could. I came down here one day just as they were having hearings on this subject of resale prices before the Oldfield committee, the Patent Committee. Mr. W. H. Ingersoll, who represented the Ingersoll Watch Co., and quite a number of others were there, and those men were violently attacking the Sherman law and

legislation proposed to supplement it, insisting that the law hampered business. I listened to these men for some time, and I turned to them, saying: "You gentlemen are entirely in error. You have a good cause, but you are ruining your chances by joining with the people who are really your opponents. You are trying to destroy the Sherman law, while it is the law which is really your protection. What you are seeking is not monopoly, but the right of free competition. Your businesses are competitive. Now, disassociate yourselves from the monopolist and join us who have a common interest with you in maintaining competitive conditions, and to this end perfecting the Sherman law." We discussed that matter mainly after the hearing had closed.

I discussed the matter with them quite informally and tried to prove to them that what I was urging elsewhere as my effort to perfect the Sherman law was not inconsistent with their interests. Later they invited me to attend a meeting to be held in New York, saying: "Come and speak to our associates as you have talked to us." I did so, and later I came before the Oldfield committee on May 15, 1912, and showed how in my opinion price standardization helps competitive business; how it develops the individual man; how it preserves the small retailer as against the great chain stores and the great department stores—and to these manufacturers I insisted: Draw a clear line between monopoly and the right of men engaged in competitive business; to control the distribution of their own goods and work for legislation on these lines. They answered: "We can not get any such legislation through." And I replied: "The only way you can get this thing through Congress is to educate the American people on this subject. Make them understand the difference, which will become perfectly clear to any man who studies the business aspect of this; bring your facts before Congress and the people and you must succeed; but the task of education must be persisted in." That was the advice I gave them, and partly as a result of the advice, doubtless, this Fair Trade League was started. In the effort to aid in this work of education I wrote the article published in Harper's Weekly in November, 1913, entitled "Cutthroat competition—the competition that kills," which was put in evidence before the Judiciary Committee.

You have asked me and others have asked me who is going to benefit by this legislation, and who wants it. I say the people who are most interested of all—whom it vitally affects directly—are the small retailers the country over, and particularly the retailers in the small towns; but indirectly consumers and the general public are vitally interested in securing such legislation.

The CHAIRMAN. The manufacturing jewelers and wholesalers can very easily educate their retailers by persuading them it would be better for them than by inducing them to write letters to their Congressmen; but how long will it take you to persuade the consumers, the bulk of the American people, that it is to their interest to go to a store and not buy things as cheaply as they can get them?

Mr. BRANDEIS. I think the consumers are being educated. I do not know whether you have heard Mrs. Fredericks. I do not know whether any of you are on the Judiciary Committee.

The CHAIRMAN. This committee does not have time to fool with any other committee hearings.

Mr. BRANDEIS. I should not think they would have; but Mrs. Fredericks appeared before the Judiciary Committee—

The CHAIRMAN. She had an invitation to come before this committee.

Mr. BRANDEIS. I hope you will hear her, because what she has to say is particularly illuminating.

The CHAIRMAN. I did not suppose she would discriminate against this committee.

Mr. BRANDEIS. I do not think she will. I think it is perfectly clear that people can be made to understand that the consumer will be benefited. Mrs. Fredericks makes it perfectly clear in her excellent book on Efficiency in the Home.

Mr. O'SHAUNESSY. Where is the consumer troubled the most now; by the bait and getting the worst of the bargains on the way up?

Mr. BRANDEIS. She is injured to a very large extent without knowing it. The consumer is frequently troubled by not being able to get an article because price cutting has induced the retailer to discontinue selling it.

Mr. O'SHAUNESSY. I mean in a money way. I have heard it said they might get this proprietary article a few cents cheaper, but at the same time they would lose perhaps ten times the amount by the purchase of other goods.

Mr. BRANDEIS. They are misled by these cut-price leaders to buy other goods for more than they are worth, and they lose time in their search for cut-throat bargains.



Mr. DECKER. Would it not be as easy, or easier, to educate the people to understand that by getting these standard articles at reduced prices that they are not making anything when they go to a store—will they not learn that as quickly as they will learn this other? Do we not have to rely somewhat on the intelligence of the consumer in the end?

Mr. BRANDEIS. If you could rely wholly on education, as I said a moment ago, there would be little need of laws, because much legislating is designed merely to make people do that which is for their best interests. A law which is not making the people do that for their best interests is rarely enforced.

Mr. BARKLEY. You spoke a moment ago about the small retailers being benefited, and mentioned in that connection the operations of these chain stores.

Mr. BRANDEIS. Yes.

Mr. BARKLEY. And it has been claimed—I do not know whether by you, but by others—that these chain stores that are located around over the country take a certain standard article and reduce the price of it below what the article ordinarily sells at in order to get the gullible public to come in and buy something else in which they will be skinned before they get out of the store.

Mr. BRANDEIS. Yes.

Mr. BARKLEY. Now, the manufacturers of these standard articles have the power and the liberty, as you might say, to refuse to sell their articles to these chain stores, have they not?

Mr. BRANDEIS. Yes, sir.

Mr. BARKLEY. If they are so interested, why do they not refuse to sell these standard articles to the chain stores that are dragging the public in for the purpose of cheating them on some article after getting them in?

Mr. BRANDEIS. They do; but the stores get the articles in a roundabout way.

Mr. BARKLEY. How is that?

Mr. BRANDEIS. The manufacturers sell their goods in ordinary course, and that purchaser sells them to the chain stores.

The CHAIRMAN. That is the old poetic method of hooking the devil around the stump?

Mr. BARKLEY. That is a very serious indictment of business integrity.

Mr. BRANDEIS. It is a very common indictment. I think it is a great departure from business integrity for any man to sell goods at a price other than that at which he agrees to sell them. I think the man ought to say, "I have made an agreement, and whether the law sustains that agreement or does not, I will keep it."

Mr. BARKLEY. Does this bill undertake to punish a man who violates that agreement?

Mr. BRANDEIS. No; I say it does not undertake to punish him; but undertakes to give the maker or producer the right to make a contract establishing a standard price, and if such a contract is valid the ordinary means of enforcing it will exist. It seeks to change the rule laid down in the majority decision of the Supreme Court.

Mr. BARKLEY. It has been some time since I read that decision. What did they decide in reference to public policy as to permitting this thing to go on?

Mr. BRANDEIS. They said this was a restraint of trade and that it was against public policy.

Mr. BARKLEY. You are urging us to pass the bill to enact a law which the Supreme Court of the United States has already said is against public policy and in restraint of trade?

Mr. BRANDEIS. That is precisely it.

Mr. BARKLEY. Would they not decide the same thing again if we undertook it?

Mr. BRANDEIS. They would not have any right to.

Mr. BARKLEY. They have the right to pass on questions of public policy, have they not?

Mr. BRANDEIS. Only in the absence of a declaration of the subject by Congress. Congress has the ultimate power to decide the matter of public policy for the Nation.

Mr. BARKLEY. Subject to the supervision of the Supreme Court.

Mr. BRANDEIS. I beg pardon, the Supreme Court has the right to determine what is public policy in a limited number of cases as long as Congress has not declared what it is. The Supreme Court has, in passing upon this quasi legislative question, made what I respectfully submit is an error; and if so, it is the duty of Congress to correct the error.

Mr. DECKER. In what case was that decision made?

Mr. BRANDEIS. In the case of Dr. Miles remedy case, and the Sanatogen case.

Mr. TALCOTT. You do not claim there is anything in either of those opinions that would warrant us in the assumption that an act of this kind would be unconstitutional, do you?

Mr. BRANDEIS. Certainly not. There is no constitutional question involved. The only question is: What does the general interest of the community demand?

Mr. DECKER. Would you think it right to have a law like this apply to land? Suppose, for instance, a man were laying off an addition in a town and he wanted to keep the price of lots in that addition up to a good high value. Why would it not be all right for him to put in a clause there that when he sold those lots to a man that man was not to sell them for less than a certain price?

Mr. BRANDEIS. I should think that probably in some instances that might be entirely unobjectionable. He does certain things of that nature now with the approval of the courts. He can provide that no man may build on the land sold unless he builds a house worth, say, \$10,000; he can provide that he can not build a stable on it; that the house may not be built nearer the street line than 40 feet. He can put all those restrictions upon the land when he sells it and the restriction binds every owner thereafter. That is what land owners are doing all the time. We are recognizing that a man laying out a tract has, within certain limits, the right to prescribe the conditions of future use.

Mr. DECKER. But they have never gone so far as to let him fix the price?

Mr. BRANDEIS. No; because it was not important that we should; but it is important for the public interests that in dealing with branded goods it should be done. This is not a question for theorizing; this is a perfectly practical business proposition.

Mr. DECKER. Take the Ingersoll watch, for instance, and I understand he is one of the main men back of this.

Mr. BRANDEIS. He is one of the most active and most intelligent of the men.

Mr. DECKER. Mr. Ingersoll makes a watch for a dollar, does he not?

Mr. BRANDEIS. He sells it for a dollar. The retailer sells it for a dollar.

Mr. DECKER. If that watch is worth \$1 to the public I can not see how it hurts his business if the selling of that watch depends, as you say, upon its value; it seems to me that the more of those watches that are sold, no difference if they were sold for 10 cents apiece, the more of those that are sold the more people will find out that he has got a good dollar watch in his pocket.

Mr. BRANDEIS. Let us go back a moment and see. It may mean a little repetition. You have stated one of the elements. It is not merely a question as to whether that watch is worth \$1, but it is whether people recognize that it is worth \$1, is it not?

The CHAIRMAN. Reputation.

Mr. BRANDEIS. Reputation.

Mr. DECKER. If it is worth \$1, though, the more people who get them and use them the more people will know about them.

Mr. BRANDEIS. You can not tell me how much this watch is worth.

Mr. DECKER. If you let me carry it for 20 years I will tell you.

Mr. BRANDEIS. I do not believe you can.

Mr. DECKER. You do not expect to carry a dollar watch for very long, but the man carries it a year and says: "This watch has kept good time all the time, just as good as my father's \$50 watch," and he is glad to get it. I am afraid you are going to make more possible his monopoly that grows by this publicity business. For instance, you talked about that case being founded on the proprietary remedy. You have got to admit that some of the best sellers in the proprietary remedy business, the best advertised, are not worth anything, and you would not advocate anybody using them; but still they have got their standardization and they have hammered it into people that it is good for colds and cholera and consumption and rheumatism, and people buy it because it has been pushed onto them and hammered into them and advertised to them, and it has been possible to do that because this law has been in effect that gives them the right to do that and to fix the price of it.

Mr. BRANDEIS. We might theorize for a very long time, but the only way to settle it is by facts, is by experience, is it not?

Mr. DECKER. Yes.

Mr. BRANDEIS. That is about the only way we can do it. We have a great deal to do with monopoly in this country, and we have heard a great deal about it.

The CHAIRMAN. It has had a good deal to do with us.

Mr. BRANDEIS. And it has a great deal to do with us, as the Chairman wisely remarks. I should like to have you point to a single monopoly in this country which has been built up, or which was aided in being built up by the establishment of a standard price.

Mr. DECKER. I think you told us before this committee once that the Tobacco Trust was largely built up—

Mr. BRANDEIS. It was built up largely by the very opposites, by the cutting of prices—the destruction of competitors through cutthroat competition.

Mr. ESCH. I think you said that the trade-mark “Bull Durham,” was worth to them \$10,000,000.

Mr. DECKER. Right there I remember your statement that the Bull Durham trade-mark was worth a great deal to them.

Mr. BRANDEIS. Yes.

Mr. DECKER. What good comes to the public by selling that trade-mark?

Mr. BRANDEIS. I will tell you about the Bull Durham, and I think I stated it at the time, wherein its particular value lay. Having that trade-mark “Bull Durham” as one of hundreds of trade-marks, they declared to the retailer: “You can not get our ‘Bull Durham,’ which you need, unless you agree to buy from us substantially every other article you deal in.” The dealer had to have Bull Durham, and that fact gave to the trust the whip hand over the whole trade. Having, by combination, brought that and the many other different brands, and having, by large capital and cut prices, obtained great power, the “Bull Durham” became an effective instrument of monopoly. It operated like the “tying clauses” in the Shoe Machinery Co. lease. The retailer could not get the things he needed without submitting to the requirement of buying also the other brands of the trust.

Mr. HAMILTON. Will you just repeat that briefly?

Mr. BRANDEIS. I say this: The value of Bull Durham depended upon the fact that it was an article so much needed by the retailer.

Mr. HAMILTON. We will assume so.

Mr. BRANDEIS. The retailer practically could not do a tobacco business unless he was able to fill orders for an article so well known and so commonly demanded as Bull Durham. The trust, therefore, said to him: “You can not have our Bull Durham unless you will buy from us all these other articles in which there would otherwise have been competition.” That was using the Bull Durham, not for the purpose of selling Bull Durham, to which there was no objection at all, but for the purpose of suppressing competition in other articles of trade.

Mr. HAMILTON. The Bull Durham Co. negotiated this deal?

Mr. BRANDEIS. No; the American Tobacco Co., having, say, 150 different articles to sell, of which 149 were competitive and one, the Bull Durham, is not, the Bull Durham standing in a class by itself, declared: “You can not have Bull Durham unless you will buy the other 149 from us.” In that way the competitors in the 149 other articles were excluded from the trade. In other words, they got the whole trade of the dealer, not on the merits of the 150 articles, but because Bull Durham was the key to the trade. As used, it traded to give the tobacco company the monopoly. Having one article practically indispensable, you use your position not to push the sale of that article, which you would have a perfect right to do, but to prevent your competitors selling other articles which you have no right to do.

Mr. HAMILTON. A monopoly may be created in a perfectly honest way, I suppose?

Mr. BRANDEIS. Yes; although most, I believe, have not been.

Mr. HAMILTON. The idea has occurred to me since I have been listening to you whether a monopoly which has been created in that way by the quality of its goods and is held, what you propose, and your position is in the interest of the people as a whole, by saying that this particular thing that you have to sell, Mr. Monopoly, shall not be sold at a less price than you fix for it. If you please, I should like to have you enlarge on that.

Mr. BRANDEIS. Your question is, assuming a monopoly to have been developed, whether the ability to fix a standard price would aid it.

Mr. HAMILTON. Whether that would not still further enhance the monopoly.

Mr. BRANDEIS. My answer is twofold. First, the ownership of a branded article, however popular, does not give one a monopoly. Secondly, a monopoly might conceivably be injured, but ordinarily is powerful enough to protect itself.

Mr. HAMILTON. You say the monopoly would be injured if some dealer, or

some large dealer, should persist in selling at a cut price; therefore, it would injure it?

Mr. BRANDEIS. I say it might conceivably be injured, and, as I want to curtail the power of a monopoly, I approve of that provision in the Stevens bill, which denies this common right to a monopoly.

Mr. HAMILTON. No.

Mr. BRANDEIS. Yes.

Mr. HAMILTON. I do not deny that.

Mr. BRANDEIS. I say the bill denies the right to monopolies.

Mr. HAMILTON. Then, in that case, what do you consider a monopoly to be?

Mr. BRANDEIS. I consider a monopoly that which has substantial control of any branch of trade.

Mr. HAMILTON. But substantial control may result from the very quality of the article.

Mr. BRANDEIS. Not control of the trade, but the enjoyment of a large part of that branch of trade.

Mr. HAMILTON. We are reasoning in a circle.

Mr. BRANDEIS. I do not think we are.

Mr. HAMILTON. Here is a monopoly, a trade grown to be very large because of the quality of this particular thing, and the corporation or the dealer has become a monopolist by reason of the quality of this particular thing. Therefore the question then arose in my mind, and this is a perfectly fair question and not antagonistic at all—

Mr. BRANDEIS. I understand. It is very illuminating.

Mr. HAMILTON (continuing). Whether we are not protecting that monopoly?

Mr. BRANDEIS. No; and there are two reasons why not. In the first place this bill declares that if a business is a monopoly it shall not have protection. Consequently the monopoly is automatically put at a disadvantage, because the bill denies to a monopoly the right to establish standard prices.

Mr. HAMILTON. Let me interject something there. You frequently have referred to the Ingersoll watch. Is the Ingersoll watch concern a monopoly?

Mr. BRANDEIS. No.

Mr. BARKLEY. It is a monopoly of the Ingersoll watch, is it not?

Mr. BRANDEIS. The company controls the Ingersoll watch, but it does not control the trade in watches.

Mr. BARKLEY. There is not any other Ingersoll watch which sells for a dollar, except this one?

Mr. BRANDEIS. Other watches sell for \$1.

Mr. BARKLEY. It is not an Ingersoll watch?

Mr. BRANDEIS. No. You can not properly say that I have a monopoly of my own law practice.

Mr. HAMILTON. You referred to Shredded Wheat once or twice. By the very quality of the thing is there not a monopoly of the handling of it?

Mr. BRANDEIS. Of course, the article, the thing I manufacture, is mine. It is not anybody else's; but that doesn't make it, properly speaking, a monopoly.

Mr. HAMILTON. But you are a monopolist?

Mr. BRANDEIS. You may say I have a monopoly of the Brandeis law practice, because nobody else may use that name.

Mr. HAMILTON. Because it is high grade?

Mr. BRANDEIS. It may be.

Mr. HAMILTON. Well, you are a monopolist?

Mr. BRANDEIS. Every human being is a monopolist in that sense, but it isn't the proper use of the word. Certainly not when we are speaking of the Sherman law.

Mr. HAMILTON. Sometimes the grocer on the north side of Main Street in a small town, who has bought all the other grocers on the north side, is a monopolist?

Mr. BRANDEIS. Then every human being you speak of in that sense is subject to the Sherman law.

Mr. HAMILTON. No; leave out the Sherman law.

Mr. BRANDEIS. I say that you are misusing the term "monopoly."

Mr. HAMILTON. Precisely. I want to get your definition of the word "monopoly."

Mr. BRANDEIS. Monopoly is a unified control of some recognized branch of trade, or some recognized service.

Mr. HAMILTON. That is controlled by one.

Mr. BRANDEIS. I do not care whether by one or more in combination.

Mr. HAMILTON. Unified control is by one.

Mr. BRANDEIS. One or three or a number of people working together. I say it is unified control, although there may be 10,000 people interested; it is unified control if it comes under one control. But it takes two things; you have not only one control but also one control of a particular branch of trade or service. Now, take the question of breakfast cereals, as to which the chairman has considerable doubts.

The CHAIRMAN. Not at all. I am willing for anybody to eat them who pleases, just so as I am allowed to eat grits.

Mr. BRANDEIS. That is a very generous attitude and one highly commendable. But take that question. There are 107 different competitors for the Kellogg Toasted Corn Flakes—one Kellogg's, another Post's, another Johnson's, another somebody else's, and so we go on. No one of those 107 concerns have a monopoly of cereals, but each man is making his individual article. I may make my article so popular that a man may buy my shredded in preference to the other 106 people, and I may have more sales alone than the other 106 people.

Mr. HAMILTON. Exactly.

Mr. BRANDEIS. I should not be a monopolist, however, for I am competing with the other 106 people. I have simply increased my business.

Mr. HAMILTON. You may drive them out of trade largely, may you not, by the quality of your goods?

Mr. BRANDEIS. If I do drive them out of trade, if I get to the point that I am the only person in it, then I have become a monopolist.

Mr. HAMILTON. Yes; but if you have one-half the trade—

Mr. BRANDEIS. If I have one-half I do not think I am a monopolist, provided I don't control the other half.

Mr. HAMILTON. To what extent?

Mr. BRANDEIS. No; I am not a monopolist. Nobody can properly say if I have one-half of the trade—I mean under those circumstances where I have simply made my article a more attractive article. The real test of monopoly is whether the field remains open to competition. When there are 106 other people in that trade, actively competing and living, and some dealers are buying those other things in preference to mine, where they have a choice—

Mr. HAMILTON. There would be no competition in your particular article, though?

Mr. BRANDEIS. There can not be properly. I can not compete with myself.

Mr. HAMILTON. You have sole possession of the field?

Mr. BRANDEIS. But I do not have a monopoly.

Mr. HAMILTON. As to that particular article?

Mr. BRANDEIS. That is true of everybody. Suppose I am a little baker here on X Street and I make a certain bread, which I call Sagamore bread. Nobody in the world can make Brandeis's Sagamore bread except myself. Suppose I have sales that amount to \$3,000 a year, how can you properly apply the term monopolist to me?

Mr. HAMILTON. I can when you have increased your sales of Sagamore bread so as to include about one-half the States of the Union. I started out with a certain proposition on which I thought we agreed, that a monopoly might be created by the very quality of the thing dealt in?

Mr. BRANDEIS. Conceivably it may be.

Mr. TALCOTT. But there is no reason why Mr. Hamilton should not start out and manufacture the Hamilton Mohegan bread, is there?

Mr. BRANDEIS. Absolutely not; and as a matter of fact he will. He not only will, but it is to the interest of the country that any man who makes an article that is so attractive that he can compete successfully with 106 others, the sale of his article growing constantly, and he making constantly more profit, that is a condition we should encourage as bringing a positive benefit to the country. His success will not become a danger unless it results in suppressing competition.

Mr. HAMILTON. And with my Mohegan bread I might stipulate that my cheapest bread should not be sold for less than a certain price, and at a less price than yours, and say that a dealer might handle both?

Mr. BRANDEIS. That is perfectly proper.

Mr. BARKELEY. According to your test of monopoly there is not really a monopoly in the United States, is there?

Mr. BRANDEIS. I do not know how many there are now, for the Department of Justice is being administered effectively. But take the case of the Standard

Oil Co., the test the Supreme Court applies was: Do they practically control the business in oil?

The CHAIRMAN. I think I can cite you an illustration which will apply to gentlemen like Mr. Stevens and Mr. Talcott. A young lady is so beautiful and charming that in competition with all other young ladies she out-shines all and monopolizes the admiration of all men. You would not run her out of town on account of such a monopoly, would you?

Mr. BRANDEIS. No; but I should like to be in that town.

Mr. BARKELEY. While you would not be willing to run her out of town, the other ladies not so fortunate in the affections of these men might wish to do so?

Mr. BRANDEIS. I hope not. I should expect such generosity from them and appreciation of beauty that they would not do it.

Mr. BARKELEY. The point is this, and that is a very apt illustration, the reason certain businesses are sought to be run out of business practically by legislation of this kind is because they are competing and because those who want to run them out do not want their competition.

Mr. BRANDEIS. I think that is a statement of exactly what is not so. This bill does not undertake to run anybody out of business. I should like to have anybody show me a single concern that would be run out of business by this law.

Mr. BARKELEY. If a condition is brought about where they can not do business, then they inevitably go out?

Mr. BRANDEIS. If you can show me where this bill is going to prevent people doing business, I should like to have you.

Mr. DECKER. Take it the other way. Are they not all on the same footing if none of these manufacturers have the right to fix the price on down to the consumer, will they not all be on equal footing and each and all have to depend for the sale of their article upon the superior merit of the article and not on the fixed price?

Mr. BRANDEIS. There may be many conditions in which men will be on the same footing. You may stop the doing of business at all and we shall all be on the same footing then. You may stop advertising and we will all be on the same footing in that respect. You may stop men from employing anybody else as employees and we shall all be on the same footing in that respect. But you will be destroying the prosperity of the country. And in taking away from the manufacturer and the small dealer an incentive to improve the quality of his article and his trade you would take a long step in that direction.

Mr. DECKER. What small dealer? The Ingersoll Watch Co. is not a small dealer; Kellogg is not a small dealer. None of these people who are advocating this are small dealers.

Mr. BRANDEIS. Every one of the concerns that have been heard before the committees of the House were once small dealers and—

Mr. DECKER. And got to be very large dealers by virtue of this price fixing?

Mr. BRANDEIS. They got to be large dealers by virtue of their merits, and partly by exercise of the right to fix a standard price which was formerly recognized. Price fixing does not make anybody big, but the absence of the right to establish a standard price may keep them small. Nobody got big by price fixing alone. It is merely an incident in the distribution of goods.

The CHAIRMAN. The insignificant character of the article manufactured does not fix the size of the business at all. For instance, a few days ago I introduced a very wise and sanitary measure to prohibit and punish all fraud in interstate commerce, expecting to restore the millenium, and the most enthusiastic response I received was from a man who makes white-pine toothpicks, and he was afraid some other fellow might find a cheaper material to make toothpicks of than white pine.

Mr. BRANDEIS. And advertise them as white-pine toothpicks?

The CHAIRMAN. Yes.

Mr. BRANDEIS. He wanted to be protected against misrepresentations.

Mr. SIMS. I want to submit this to you. Let us suppose for the purpose of illustration that the Ingersoll watch is controlled by a monopoly. In other words, we will suppose the manufacturer of the Ingersoll watch has bought up patents of other cheap watches and their competitors have ceased to make them. Then let us suppose that some other man, with large capital, is making a \$2 watch, and we will suppose—because I think it is true that a watch is a utilitarian instrument and everybody in this day and age ought to have a watch—and that at \$1 many people could get a watch who could not get one at \$2. But let us suppose this man with

any power in the Ingersoll Co. to fix the resale prices, this man of large means can go to buying up and put somebody to selling Ingersoll watches in every city of the Union at 50 cents apiece, and then Mr. Ingersoll, or whoever owns it, gets tired of that sort of business and this man with the \$2 watch proposes to him to buy his brand or buy his patent and buy his monopoly out, and they trade. Then the poor people, the public have to pay \$2 for a watch that does not do anything more for them than the \$1 watch did. Now, in a way does that not take away the power of reasonable restrictions, and may that not create the conditions favorable to a large monopoly and for grinding down, driving the manufacturer of the \$1 watch out of business?

MR. BRANDEIS. I would say yes to that, but I want to add something. In the first place, by the Stevens bill, which is very carefully drawn, this common right to establish standard prices which a manufacturer ought to have, unless there is some good reason to the contrary, this common right of fixing a resale price is taken away from a concern which has a monopoly. The result, therefore, is if anybody does become a monopolist—

MR. SIMS. Then it does not apply?

MR. BRANDEIS. Then it does not apply and we need not bother about it. But the second point you present is absolutely true. The moment you allow the cutting of prices you are inviting the great, powerful men to get control of the business. That brings us to another point that I wanted to develop and point out what the real dangers are in trade and where the real danger is to this country.

MR. BARKLEY. Take this Ingersoll watch as an illustration. Suppose it is true that Ingersoll gets his own price for his watch?

MR. BRANDEIS. You mean by that he gets a price satisfactory to him?

MR. BARKLEY. He gets a price he asks from those to whom he sells.

MR. BRANDEIS. He must ask a price that he can get and he must get the price he asks—

MR. BARKLEY. And he fixes that price?

MR. BRANDEIS. Yes, sir.

MR. BARKLEY. According to what a reasonable profit would be upon his investment?

MR. BRANDEIS. A price which, in his judgment, would be a proper profit.

MR. BARKLEY. He sells that watch, and always has sold it to the person to whom he does sell it at 50 cents?

MR. BRANDEIS. Yes; the price perhaps varies from time to time. It may or it may not.

MR. BARKLEY. Now, if he does—being the sole manufacturer of the Ingersoll watch, sells his product for what he asks for it, and the price of it has not been reduced so far as he is concerned—what right has he in morals or in business to follow that watch up until its ultimate purchase by the man who wears it on the chain, to determine whether or not it shall be sold at \$1 or 75 cents?

MR. BRANDEIS. Let me try to answer that question. You say what right has he to do it? By that you mean, of course, what moral right, what justification has he? Well, his only justification from his own standpoint is this, that it is injurious, directly or indirectly, to him if the man—

MR. BARKLEY. He is afraid it may be injurious sometime in the future, but admitting it has not been injurious yet.

MR. BRANDEIS. How do you know he admits it?

MR. BARKLEY. Because he has sold his watch for what he asks for it and the trade has not been diminished.

MR. BRANDEIS. How do you know his trade is not smaller than it otherwise would have been? The amount of profit I make depends upon three things: In the first place, how much it costs me to do business; in the second place, how much profit I make on each article I sell; and, in the third place, how many articles I sell. The cutting of prices increases my expense and reduces the number of articles which I sell; then I lose money by the price cutting, do I not? I mean lose profit in the sense that I do not make as much as I otherwise would.

MR. BARKLEY. In the aggregate?

MR. BRANDEIS. In the aggregate, and of course the aggregate is the only thing the business man cares for. Mr. Ingersoll has explained to the Judiciary Committee how the cutting of price has injured him in both these respects. In the first place, price cutting has added tremendously to the cost of doing their business; in the second place, it has reduced the number of possible purchasers

of his watch. Let me show you how that happens. He must, so far as possible, protect his trade; I mean he must try to keep the 23,000 jewelers and thousands of booksellers and stationers and druggists who are selling the Ingersoll watch—he must keep on selling Ingersoll watches and exhibiting them in their show windows, because unless those avenues of sale remain open he will not be able to market his watches. So every time he loses a dealer he loses profit, because he reduces the number of watches that he sells. It is the number of times he realizes a profit on a watch which makes up his aggregate profits. Now, in the way I pointed out before the cutting of the price of any Ingersoll watch by any prominent concern will induce ultimately other dealers to give up the Ingersoll watch, because if they sell it at this low price they do not make any money on it and, furthermore, there is created in the minds of the public the idea that they have not been giving value, for they have been charging \$1 for what somebody else sells for 67 cents. The short way out of that difficulty seems to the dealer to be much like this: The Ingersoll watch is only one of many articles we sell, and we had better give up that article than run the risk of both ruining our reputation and doing business without making money. So Mr. Ingersoll loses these customers.

Mr. BARKLEY. But the public still goes on buying Ingersoll watches?

Mr. BRANDEIS. Not to the extent they otherwise would. You do not have to buy an Ingersoll watch—I do buy them occasionally in the summer when I am going camping or boating. If it is convenient for me, I buy an Ingersoll watch and leave my gold watch at home, but if it is not convenient I do not buy one. I take a chance with my gold watch. There is not any given number of Ingersoll watches that must be bought; and many men will not go a half mile or three-quarters of a mile to get one. In the first place, it may not occur to them to buy one unless they see it in the show case. Furthermore, expense is also great of trying to keep retailers in line. We try to make them understand how mistaken the policy of price cutting is. Mr. Ingersoll says: "This thing is hurting me; but I am not the only person hurt; I am only one of a thousand manufacturers and producers, and I am one of a million or two business men, because more than a million retailers are vitally interested in preventing cutthroat competition." It is injuring the public also, because it is denying the public the opportunity of getting many a good article conveniently. Retailers the country over have been finding out that price cutting is one of the causes of dwindling success; and one retail association after another, national, State, and local associations, have gone on record, demanding that this illegitimate competition be put an end to. Many small retailers say we are willing to lose our business if the public interest demands it, but public interest makes no such demand. Big business is not more efficient than little business. It is a mistake to suppose that the department stores can do business cheaper than the little dealer.

(Thereupon the committee took a recess until 2 o'clock p. m.)

#### AFTER RECESS.

#### STATEMENT OF LOUIS D. BRANDEIS, ESQ.—Continued.

The CHAIRMAN. You may proceed, Mr. Brandeis.

Mr. BRANDEIS. The question that I was about to discuss before the noon adjournment is one that must interest us all very deeply, namely: If we are to allow the small retailer to be protected from an improper attack, should we do so at the expense of efficiency? Or, to put it in other words: Is it economically desirable, in the interest of the community, whatever may be the effect socially, to eliminate the smaller retailer and to substitute for him the department store or the chain stores or the mail-order houses?

An impression has gained currency that the department store could afford to sell for less than the other because the expense of doing business was less.

Mr. BARKLEY. In proportion?

Mr. BRANDEIS. In proportion; yes; than the smaller store. That I conceive to be clearly a misapprehension. It may perhaps have been true to a certain extent once, but it clearly is not true to-day. Nearly every department store in the country finds its percentage cost of doing business—that is, its percentage of expense—constantly increasing. And not only is the expense increasing, but it is increasing very largely as compared with the expenses of the small retailer. In the large department stores the expense rate rarely goes below 25 per cent and frequently rises to 30 per cent of the selling price of the article.



Within certain limits you may get by size a relatively smaller unit cost; but the size of greatest efficiency is reached at a comparatively early stage. With the growth in size comes an increasing cost of organization and administration, which is so much greater than the increase in the volume of business that the law of diminishing returns applies.

This results from a number of facts. One is that nobody can look after a business as well as the owner. He understands it; he gives his whole heart and soul to the business; he brings all factors into their proper relation, often by unconscious cerebration; he is enabled thereby to exercise a wise judgment in the adjustment of the purchases and sales and expenses of that business. But this is not possible ordinarily if the business is very large.

Another element is this: The department store seeks to find substitutes for "personality," which is always so large a factor in selling. It seeks by one device or another to create attractions; but each new device tends to increase expenses. The great fertilizer, advertising, is liberally resorted to, as for Monday sales; but those sales are often purchased at a tremendous cost.

Mr. HAMILTON. Did I understand you correctly, Mr. Brandeis, when I understood you to say that the cost of making a sale is about 25 per cent?

Mr. BRANDEIS. On the average, in a department store, and often 30 per cent. The department store that has an average cost of only 25 per cent of the selling price ordinarily makes large profit. At 25 per cent expense the profit is good.

Mr. HAMILTON. That is, no matter how fast the sales are made, the cost of making them still is the same?

Mr. BRANDEIS. On the average. Of course, some things cost more to sell than the whole selling price, and other things cost less. A department store which keeps its expense down to 25 per cent of the selling prices will make a lot of money, if its merchandising is done with reasonable ability.

Mr. HAMILTON. I suppose the theory on which they proceed is that small profits on frequent sales are better than the large profit on small sales?

Mr. BRANDEIS. That has been the contention and the general assumption; but the point is that it does not sell and can not sell at lower prices than the smaller retailer. In practice they actually do not make their profit by distributing at smaller expenses. They make it in spite of the expense being larger. The profits of the department store and of the chain stores, as compared with ordinary retail stores, comes in a different way. It comes from the ability to get an inside price on the goods which they buy. That is where the profit comes from. The ordinary retailer who competes with the department or chain store shows an average expense of 20 to 22 per cent; but the small retailer labors under the disadvantage, as compared with these great wholesalers, that he can not get his goods as cheap.

One of the highest officers of one of the great trusts said to me a little while ago, speaking of the chain stores with which he had himself been connected: "My experience in those stores has entirely changed the idea that I had in regard to them. When I connected myself with those stores, I thought by aggregating a large number of stores I could do the business at much less pro rata expense, but I find my expense account is running away from me. The cost of supervision is constantly growing. I put one check upon another to bring to me the knowledge of what is going on and to prevent abuses. I find myself at a disadvantage in expense as compared with the corner druggist or grocer."

Mr. HAMILTON. May I interrupt you there as far as the drug store supplies an illustration? I have an acquaintance who runs a drug store and it is doing well. I think the way he located that particular store was to ascertain the number of people passing by on the sidewalk at that particular corner at certain hours in the daytime, for perhaps two weeks. That store prospered, and he has, at another place in the same town, which is a considerable city, where there were a great many people, located another store in the same way. He was getting very good returns out of both of them. Why should not he be able to get good returns out of more stores located on the same theory?

Mr. BRANDEIS. For the very simple reason, Mr. Hamilton, that there is a limit on human capacity. As the Germans say, "Care is taken that the trees do not scrape the skies." If it were not so, one man could control most branches of trade.

There is a point of saturation for every man's ability. Until he reaches that point of saturation he can gain constantly by increasing the field of his operations.

But it does not follow that because I am making more money on a large volume that I am doing business at less cost. I may do business at more cost, but I may have capital enough to earn more in the aggregate. But there comes a point where the expense of the larger business per unit grows so great that the large business brings smaller profit, unless, indeed, there is something to counterbalance that added expense of doing the business; and that is what I want to consider now.

What makes it possible for many of the department stores and many of the chain stores to prosper is the fact that they get an inside price on their goods.

Mr. HAMILTON. Is not that the result of buying large quantities of any one particular thing?

Mr. BRANDEIS. Partly that and partly their influence otherwise. But dealers purchasing in larger quantities are sometimes denied advantages over others. Take the famous decision in Ohio where the receiver of a railroad gave the Standard Oil Co. not only a rebate of 15 cents on a 25-cent rate, but actually paid the company 15 cents in cash on what it hauled for the Standard's competitors. This was done because the Standard declared it would put in a pipe line and take away all of its oil business if the receiver refused. The receiver was entirely honest, but the court insisted all shippers must be treated alike. So the Standard Oil Co. endeavored to get a lower rate than smaller shippers by agreeing to ship every day a trainload from one point to another. They pointed out that such service cost the railroad much less than hauling 30 or 40 or 50 single cars for different shippers; but the law stepped in and said, "No; that will inevitably result in building a big concern which can control the market."

The railroad could haul a trainload cheaper than it could haul an individual car; but the public interests would not permit a lower rate to be made per trainload, recognizing only carload rates and less-than-carload rates. You have to depart from the old business of buying at wholesale.

If we wish to preserve the small dealer from destruction we may be compelled to require that all retailers, large or small, be enabled to purchase the same article at the same price, applying the one-price policy throughout. Many enlightened manufacturers have already abandoned the practice of giving quantity discounts, coming to this conclusion, that if they wish to preserve the small retailer they must do so. For instance, this course has been taken by the Kellogg Corn Flakes Co. and the Hamilton watch concern.

When the Stevens bill was drawn we found manufacturers and producers willing to have such limitations placed upon the right to establish standard prices, as were deemed desirable in the interests of the public and we accordingly inserted this provision: First, denying the right to those who were a monopoly or a part of a combination; second, denying it to those persons who undertake to discriminate between different prices charged; and third, requiring that the prices to be charged jobbers, retailers, and the consumer be made public by filing in the appropriate office of the Government, so that everyone should know the prices at which he and his competitors could buy.

Mr. HAMILTON. The manufacturer might want to displace the business which has a standing or to defeat the designs of that individual or corporation; but probably they want to retain, until at least they have a standing, the position of having the right to cut rates, I suppose.

Mr. BRANDEIS. He ought not to want to. Everybody is perfectly free to do it, of course. The only point is if you want a protection for your fixed selling prices you must be willing to take it with these limitations.

Mr. HAMILTON. After he gets the standing he may say, "I can well afford to do that now."

Mr. BRANDEIS. Let him say he will not ask for any protection until he does want it.

Mr. HAMILTON. That is the idea; yes.

Mr. BRANDEIS. He is perfectly right. There is no obligation. He can say, "I am going to sell now, and I will get along the best I can without any protection from any contract, and at such time as it suits me I will come in under these terms."

Mr. HAMILTON. I suppose it is true that business is being more and more reduced to a few large units—run by a few large units—is it not?

Mr. BRANDEIS. That is true, and that is very regrettable; but it is not inevitable.

Mr. HAMILTON. Not calling them monopolies.

Mr. BRANDEIS. I mean whether you call them monopolies or not monopolies.

Mr. HAMILTON. I am calling them units.

Mr. BRANDEIS. Call them "units" and eliminate all that gives rise to opprobrious epithets; the very large unit will remain socially objectionable.

Mr. BARKLEY. Does this bill prevent any large concern from obtaining an inside price from a monopolist?

Mr. BRANDEIS. No; except this, that it would deny to a monopoly the legal protection afforded to standard prices, and would prevent those who come under the law from giving quantity discounts to the large customer.

Mr. BARKLEY. As a matter of fact, does not the recent antitrust law, that we passed through both Houses of the Congress and which is now a law, give even the monopoly the right to make discriminating prices, based upon quantity, etc.?

Mr. BRANDEIS. Yes, it does. But this law does not undertake to limit the purchaser.

Mr. BARKLEY. So that the manufacturer, under that law, still could make a discrimination as to the price based upon quantity—

Mr. BRANDEIS (interposing). No.

Mr. BARKLEY (continuing). That he might sell to any department store or mail-order house, or any other concern?

Mr. BRANDEIS. He could not avail himself of the privileges of this law; that is, this law does not undertake to prevent manufacturers generally from making discrimination, but no manufacturer who makes discrimination can get the protection which this law gives; consequently the man who—

Mr. BARKLEY (interposing). In order to enable a man to get the benefit of this law, he must violate a well-established business principle that is recognized by the antitrust law.

Mr. BRANDEIS. It is not prescribed by the antitrust law.

Mr. BARKLEY. That principle is of selling large quantities cheaper in proportion than small quantities.

Mr. BRANDEIS. No man violates any law by refusing to give quantity discounts. He does not avail himself of the privilege which the law still leaves open, but which I think in comparatively few years the law will not leave open, because I think it is fraught with very great evil.

The practice of giving quantity discounts menaces the small retail business. The community is not yet at the point where it is ready to apply generally the principle by which it has protected the shipper in respect to the railroads, which the United States applies in the sale of stamps and the Parcel Post Service. But we may say to those men who come here and ask for protection in establishing standard prices, but which the Supreme Court has inadvertently denied them, that we are willing now—

Mr. BARKLEY (interposing). We are not authorized now, I think, to assume the Supreme Court inadvertently does anything.

Mr. BRANDEIS. Why not?

Mr. BARKLEY. Because it is the supreme judicial body of this land, and we are supposed to recognize it as the highest legal authority, and we have no right to presume the Supreme Court, in passing upon this question, acted inadvertently; because if we have that right, we might presume they acted that way in handing down other of their decisions.

Mr. BRANDEIS. I am very glad of the opportunity of pointing out to Mr. Barkley more clearly what I mean. The Supreme Court is a court which, when it is construing the Constitution of the United States, is supposed to lay down the final law. But we amended the Constitution in respect to the income tax because we believed that the rule laid down by the Supreme Court was not consistent with the public interest.

Mr. BARKLEY. It was not erroneous with respect to its interpretation of the Constitution, as it turned out later, because we had to amend the Constitution.

Mr. BRANDEIS. The rule laid down was not in harmony with public policy; so the people, who are the supreme authority—

Mr. BARKLEY (interposing). In that matter the question of public policy was not involved.

Mr. BRANDEIS. Precisely.

Mr. BARKLEY. It was whether or not the income tax levy was a violation of the Constitution.

Mr. BRANDEIS. Precisely; and in a very large number of cases where questions of strict law are before the court we have to accept the decision of the court as the highest authority. But on a question of public policy it is no

disrespect to the Supreme Court to say that the minority of the court were mistaken. There is no reason why five gentlemen of the Supreme Court should know better what public policy demands than five gentlemen of Congress. In the absence of legislation by Congress, the Supreme Court expresses its idea of public policy, but in the last analysis it is the function of the legislative branch of the Government to declare it the public policy of the United States. There are a great many rules which the Supreme Court lays down which may afterwards be changed, and are afterwards changed, by legislation. It is not disrespect to the Supreme Court to do it. Their interpretation of the law may be set aside by a new law.

Mr. HAMILTON. That may, and sometimes does, finally result in expansion of the Constitution?

Mr. BRANDEIS. Whether expansion of the Constitution or change of law.

Mr. HAMILTON. It may be a change of Constitution. That is expansion. Or it may be interpretation of the Constitution which results in expansion of the Constitution. In both ways the public wish may be expressed.

Mr. BRANDEIS. It may be expressed either way, by constitutional amendment or by act of Congress. In one case one is necessary, and in another case the other is necessary.

The point is—and this is a very important point—that the thing the Supreme Court was passing upon here was not a thing involving legal erudition. If the court had followed what other courts had said on this subject it would have decided the other way. It merely exercised its judgment as to what the interests of the country demand and made its interpretation as to what Congress had intended by the Sherman Act; and if Congress does not agree with the Supreme Court in this respect it should so declare by enacting the Stevens bill.

Mr. O'SHAUNESSY. Do you claim, Mr. Brandeis, this law will stop the diverting of business from the small retail store to the department store?

Mr. BRANDEIS. Not all. And it ought not to be stopped.

Mr. O'SHAUNESSY. I mean largely.

Mr. BRANDEIS. No; I think the department store performs a valuable service. I think these chain stores and mail-order stores are useful. I think we should be poorer if we lost any one of them.

Mr. O'SHAUNESSY. But there is a diverting of some amount of business now?

Mr. BRANDEIS. Yes; there is a certain diversion which is illegitimate.

Mr. O'SHAUNESSY. And which you want to stop?

Mr. BRANDEIS. The illegitimate part I want to stop, and the rest of it I want to leave, because, so far as these businesses are honest and efficient factors in merchandising, we need them. The small stores are better off for honest competition of that kind, just as they are better off for honest competition of other kinds. It is a question of the kind of competition. We stop unfair competition, and it is because this competition is unfair and has injurious effect that it ought to be stopped, and for that reason alone.

Mr. BARKLEY. I asked a question this morning, going back to the question of public policy, if the passage of this law would not presuppose that the Government, having in advance sanctioned the power of the manufacturer to fix his own price, not only the price at which he would sell to the purchaser from him, but the power to follow that thing on down the line to the most ultimate consumer, perhaps through a hundred middlemen, and say what the consumer shall pay for it—if the Government is in advance sanctioning the manufacturer in saying what that price shall be when it gets down to the tail end of the horn, will not that presuppose the necessity of the Government standing by to see that the manufacturer does not put too high a price on the thing?

Mr. BRANDEIS. Absolutely no.

Mr. BARKLEY. Then, in other words, your position is that the Government sanctions in advance the fixing of a retail price by the manufacturers, but takes no step to protect the retailer against an exorbitant price that might be fixed by the manufacturer?

Mr. BRANDEIS. There is no occasion for it.

Mr. BARKLEY. Suppose he fixes a price that is not justified by the cost of production?

Mr. BRANDEIS. Then few will buy his article.

Mr. BARKLEY. How do you know it?

Mr. BRANDEIS. As long as you have ample competition people will not buy ordinarily that which is offered at exorbitant prices.

Mr. BARKLEY. Suppose the customer has used a certain article and likes it better than any other, and the price is advanced by reason of the passage of this bill 25 per cent; of course, he has the power and the privilege not to buy it.

Mr. BRANDEIS. Yes. The law of competition of desires operates. The man likes his dollar more than he would the package of these goods, so he buys something else.

Mr. BARKLEY. That is, the law of competition of desires applies as well to the business man at the same time?

Mr. BRANDEIS. Yes; I want that applied to the business man.

Mr. BARKLEY. And it is not wholly impossible that the law of competition of desires has something to do with the activity of the organizations that are behind this legislation?

Mr. BRANDEIS. I have no doubt. I should hope the organizations are looking after their interests. I do not know who else will look after them if they do not.

Mr. BARKLEY. I wish you would answer my question now; I would like to have you give your reasons.

Mr. BRANDEIS. I want to answer your question. Let me answer it and I will give you my reasons.

Let us suppose I am selling Tip-Top bread from my own bakery down here on Pennsylvania Avenue. I fix the price at 10 cents per loaf. That may be an exorbitant price, according to your views. If it is an exorbitant price and many people agree with you they will not buy Tip-Top bread, because there is other bread they can get, and the pleasure of buying Tip-Top bread, with its beautiful oiled-paper covering, will not be sufficient to induce them to pay that money.

There is ordinarily no law in the world that would prevent me from fixing a price on bread which I sell over my own counters. Nobody suggests interfering with that right. If, instead of confining my business to a business of \$3,000 or the selling of Tip-Top bread over my own counter, I undertake to extend it and have five agents scattered over the city, and at each agency of mine which I am able to establish I sell that Tip-Top bread at 10 cents, which may be an exorbitant price again, and no one suggests interfering with that right, why should you interfere with the right to fix the selling price, when the bread is marketed through independent retailers instead of agents? If people who have a choice of buying one of several articles buy my make at 10 cents while others are offered at less, that shows that my price is not exorbitant.

The CHAIRMAN. Mr. Brandeis, you are a great student of human nature. If this bill should become a law, knowing as much as you do about the rebellious tendencies of ordinary mankind, do you not think it would breed a disinclination on the part of dealers to trade with a man who would exact these contracts, and they would build up other lines of business?

Mr. BRANDEIS. No; I think not; but it is to be remembered that the number of people who fix prices is not by any means all. There are always a great many more articles on which the prices will not be standardized.

The CHAIRMAN. But would not people hunt them for trade because they did not fix prices?

Mr. BRANDEIS. No; they will hunt the trade which gives them the most for their money. Sometimes it will be the thing on which the price is fixed and sometimes the thing on which the price is not fixed; and every retail merchant ought to have the right and privilege of choosing from any one of these competitors. He will choose from these 107 breakfast foods. He does not have more than five or seven in his store, and has all the rest of 100 to choose from, and to make his changes as he sees fit.

Coming back to this question, however, there is no occasion to protect the community against the price of an article in which there is no monopoly. If you have fair competition and an open field, that which is best and cheapest will win. Of course, what is the best and cheapest will depend upon a lot of considerations. There may be 10, each of which is best—according to the views of different people. The Government certainly ought not to object to a man making large profits if he makes them honestly. He may make the large profits by manufacturing an article very cheaply or because he has better organization ability, or because he adopts a better system of distribution.

We should encourage great gains and not look with jealousy upon them. But we should allow great gains to be made only under conditions which are in accordance with honest business principles; we should prevent their being made through oppressive practices. There can not be such a thing as an oppressive price in a competitive article.

Mr. BARKLEY. I can see that if this bill should become a law, and it came to pass that every retail merchant in the country were able to do business on

the same basis of overhead charges and things of that kind, it might not work any hardship for all of them to sell a given article at the same price. But under this law, no manufacturer would have a right to require one merchant to sell his article at one price and another merchant at another price. He has got to require them to all sell at the same price, whether that merchant be in New York or in California, and regardless of the expense of doing business by that merchant.

Mr. BRANDEIS. Yes.

Mr. BARKLEY. I am not so much interested in toasted corn flakes or shredded wheat as I am in wagons, and plows, and harvesters, and stoves, and shoes, and hats, and things that the ordinary man uses. If this becomes a law, nearly every plow which is manufactured and every wagon which is manufactured could come in under the special brand features of this bill. For instance, the Oliver Chilled Plow is a special brand of plow. The manufacturers of this plow or any farm implement or anything that goes to make the necessities and comforts of life, may come under this special brand feature. It makes no difference what is the expense of doing business, although he may be able to do business in California or in Kentucky at one-half the expense required in New York, and therefore can receive a smaller proportion of price for the thing which he sells and still make a reasonable profit, or a profit that he would reasonably be entitled to; yet if this bill passes he is required to sell the thing, which he could sell cheaper, at the price named by somebody in New York, although he could sell at a less price and still make a reasonable profit, merely because that uniform price is fixed for the man in California and New York. That is the thing which bothers me.

Mr. BRANDEIS. Let me answer that question with reference to the expression that you used. This man at this particular place is "to be required to sell this article." He is not required to sell it.

Mr. BARKLEY. He is required to sell it, if he sells at all, at that price or he may be denied the right to sell it.

Mr. BRANDEIS. He may be denied it for any number of other reasons. Your plowman has a choice of 98 different plows. He can sell any one of the 98 plows, provided the owner of each one of those 98 different plows will sell it to him.

Mr. BARKLEY. Right there. In the antitrust bill passed recently it was shown that manufacturers of plows would go to a country merchant and say, "You must either sell my plow and nobody else's plow or you can not sell mine." An effort was made in that bill to prevent that very thing, to prevent men from going to a merchant and saying, "If you sell anybody else's plow, you shall not sell mine." This bill undertakes to say to him, "If you do not sell at my price, you shall not sell it."

Mr. BRANDEIS. And it produces exactly the opposite effect.

Mr. BARKLEY. That is a metaphysical or scientific proposition that I would like to have a little light on.

Mr. BRANDEIS. Not metaphysical; it is highly practical. When I say, "If you sell my plow, you can not sell anybody else's," I have excluded all other persons from the market. So far as that individual is concerned, he is prevented from dealing in other goods. Whether that is desirable or not is a question on which men have different opinions. But the effect of it is to exclude every article that competes. When I say to a man, "If you sell my plow, you shall sell it for \$84 and not less and not more," I invite competition of every one of the other 97 plows, either that they may be—

Mr. BARKLEY (interposing). They may not be as good plows?

Mr. BRANDEIS. And if they are not, what right have you to my plow? I make the plow, and I have a right to let you have it or I have the right to not let you have it; and I say to you, "What right have you to buy my plow at a price that is not mine?"

Mr. BARKLEY. You have the right on the transaction that occurs between you and me; but when an innocent third person comes in I can not see that right extends to him.

Mr. BRANDEIS. But nobody who is innocent would be affected by this law; if you mean by "innocent" an ignorant person who does not know—

Mr. BARKLEY (interrupting). No; I do not mean that.

Mr. BRANDEIS. Nobody is innocent who makes a contract with me to sell at a certain price and then breaks that contract.

Mr. BARKLEY. I will admit that.

Mr. BRANDEIS. That is the only case we have to consider here.

Mr. BARKLEY. But you are leaving it in the power of the manufacturer to prevent him from entering into a contract unless he agrees to certain things.

Mr. BRANDEIS. That is true of every contract you enter into.

Mr. BARKLEY. But the other contract requires Government sanction by special act.

Mr. BRANDEIS. Prima facie, a man has a right to enter into any contract he wants to; the limitation is, it must not be against public policy. The only question we have to consider is whether this is the kind of a transaction that injures the community.

The CHAIRMAN. I want to go a little further on that.

Mr. BRANDEIS. May I follow Mr. Barkley up on this question, because he put it to me before?

The CHAIRMAN. Go ahead.

Mr. BRANDEIS. I say I have a right absolutely to say to you that I do not care to sell you that plow. You have not any right to demand my plow. I am not a common carrier, where you can come to me and say, "I want your service, and I am equally entitled to it with anybody in the world." No; I am in private business, and I say I am going to sell this plow only to men with red hair or men with gray hair, or men with black hair, as the case may be. That may be an idiosyncrasy of mine, or it may be because I have some good reason; but I am at liberty to sell or not at my election, even if I decide on such crazy ground as the color of a man's hair. But ordinarily men make the conditions which they, in their judgment, think their own business interests demand. These growers and packers of fruits say, "Our business interests demand that we should market our goods under such conditions that everyone who buys them will buy them on the same terms. The retailers will throw up our goods if they can not get a reasonable profit on them or if people lose confidence in them, and they will lose confidence if some one else cuts the standard price. Therefore the manufacturer, for his own protection, determines to maintain that price, and refuses to sanction any dealer breaking that price because it injures his own business. Why should anyone have a right to complain of this business policy, since no one has the right to have my goods at all except on the terms the manufacturer chooses to make?"

Mr. BARKLEY. Under existing circumstances, under the general law, anybody has a right to make a contract with anybody else that he pleases, so long as that contract does not violate what we call public policy.

Mr. BRANDEIS. Yes.

Mr. BARKLEY. Now, under the present law, as interpreted or as made by the Supreme Court, he can not make that contract.

Mr. BRANDEIS. He can not make that contract in interstate commerce, but he can make that contract in individual States.

Mr. BARKLEY. That is one of the contracts that he can not make.

Mr. BRANDEIS. Not in interstate commerce. That is the reason we want to enable him to make it. It is unwise to prevent his making such a contract in interstate commerce. He can make it in Massachusetts, because that is intrastate commerce. Let me give you an illustration: Suppose I am a manufacturer dealing in Massachusetts with a Massachusetts jobber, and the Massachusetts jobber is dealing with a Massachusetts retailer; I can make such a contract. In that case it does not involve interstate commerce. I can do the same if I am a dealer in New York, Kentucky, California, or the State of Washington. I can do exactly the same thing in England, Germany, Belgium, and France. In each one of those countries such a contract can be entered into legally. But in interstate commerce, owing to the decision to which I called your attention, such a contract is not legal.

Now, what I say is this: Such a restriction upon individual liberty, instead of being beneficial it is harmful, and therefore I say that Congress in its wisdom ought to correct the error.

Mr. DECKER. As I understand it, your theory and your object is to restore the individual right to make a legitimate contract?

Mr. BRANDEIS. Yes.

Mr. DECKER. Then, in the same bill, it seems to me, that you take the other tack and limit an inherent and legitimate right of men to give discounts?

Mr. BRANDEIS. I do; and do you want to know why?

Mr. DECKER. Well, I want to realize the full force of your theory.

Mr. BRANDEIS. Yes.

Mr. DECKER. For instance, here are two men, say you and I, and here is a manufacturer. You want his goods and I want his goods. According to the

theory of this bill, if you buy \$10 worth of a certain kind of goods you will pay for it at the same price that I would pay for \$1,000 worth of the same kind of goods. You say that the man has a right to sell his goods to all men alike, whether they are white haired or black haired. A dealer might be a friend of mine; he might think that I might be able to develop his goods for him in the future and he might want to give me a slight reduction in price. It seems to me that instead of giving more freedom of trade this bill contains more slavery than freedom.

MR. BRANDEIS. Mr. Decker, my contention is this: A man must start out in business some way. He has certain liberties guaranteed to him by the Constitution which should be protected by the laws of the land, and one of them is liberty of contract. The liberty of contract guaranteed by the Constitution is not, however, absolute; it is subject to the police power of the Federal Government, either as applied by legislation or by limitations in other ways. The law has a right to step in and should step in so far, and only so far, as liberty of contract is used to the injury of the public. I say that the right of the individual to fix a resale price for his goods is consonant with the public interest. That, of course, is an inference from facts—the facts being our past business experience.

The other question, whether a dealer shall be allowed to give quantity discounts presents another and distinct question. Experience teaches us that the quantity discount is harmful, just as it teaches us that the establishment of standard prices is beneficial. When we undertook to ascertain why it is that the small man is crushed out and the large man grows bigger under certain circumstances, we found as a matter of business experience that the quantity discount is one of the main causes. We limit a man in freedom of contract in many respects. We limit a man in the number of hours he can employ a woman to work for him; we limit the hours of labor of women to 8, 9, and 10 hours a day in different States. These are certain liberties which we have found by experience it is wise to curtail. But wherever you do not have to curtail liberty, wherever the exercise of full liberty by a business man is consistent with the public welfare, public policy demands that we should allow him that liberty, because freedom is the fundamental basis of our Government and of our prosperity.

MR. DECKER. I understand that, but the point I want to bring out is that there is such a restriction.

MR. BRANDEIS. There is restriction, but experience teaches us that certain restrictions are wise, and these men who seek the privileges of fixing resale prices ought to be willing to subject themselves to this restriction in the public interest.

MR. DECKER. If this bill was passed, what do you think would be the result? Would there not be a great increase in the manufacture of standardized goods and would not business increase more and more along that line?

MR. BRANDEIS. I think there will be an increase, but I think there will be always a large number of articles that will not have a standard price.

MR. DECKER. Now, another point. You say that we must not get theoretical, but I want to follow out your line of argument. Suppose that this system of doing business by standardizing the price of all manufactured articles were to grow until it was practically universal. Then suppose you and I each started a store on opposite sides of the street. We will suppose it was a hardware store on each side of the street, or a farm-implement store. Suppose everything we sold to our consumers was a standardized article, trade-marked, and required to be sold at a certain price? Where would the consumer get the benefit of any competition between us?

MR. BRANDEIS. Well, I will tell you. There would be 107 breakfast foods, and neither you nor I could keep all of the 107. Then there would probably be 50 different makes of hatchets, and neither of us could keep all the hatchets. My neighbor across the street might take hatchets No. 1, No. 8, and No. 15. I might think that I might make a better move by handling other ones. The result would be that you would find these 50 hatchet makers competing with one another for all the trade all over the country, each man trying to make the best hatchet at the same price. We are selectors and distributors. In a competitive business you will find as an actual fact that no one dealer takes all makes of goods. He could not.

MR. DECKER. But take the case of something like an Ingersoll watch. Mr. Ingersoll testified before the Patents Committee that he only had four competitors in the United States.



Mr. BRANDEIS. Well, then, take four.

Mr. DECKER. Well, the truth of the matter is that we know from actual knowledge that he does not have much competition from those four.

Mr. BRANDEIS. Well, yes.

Mr. DECKER. Now, the nearest one of those competitors that compares with him is the Big Ben Clock Co. That is a joke, because you can not put a Big Ben clock in your pocket.

The CHAIRMAN. It may not take as long to wind it up.

Mr. DECKER. Well, there may be some competition in that.

Mr. BRANDEIS. Yes.

Mr. DECKER. Suppose there are only four or five competitors. For instance, take the harvesting business. Take the States of Missouri or Arkansas, for example. I think that you will find, from practical experience, that there are not more than eight or nine brands of plows ever heard of. I have had some experience with farms, being raised on a farm.

Mr. BRANDEIS. Eight or nine?

Mr. DECKER. There are not eight or nine brands ever heard of.

Mr. BRANDEIS. Not by any one dealer in Kentucky.

Mr. DECKER. Well, I will venture to say that there are not 10 brands known by any ordinary farmer. You take a township of farmers and write to each one of them and ask them how many brands of plows they have ever heard of in the last five years, and you will not get more than 10 or 20 different names.

Mr. BRANDEIS. That is entirely probable.

Mr. DECKER. Now, let us go still further. They might all want the Harvester Trust products.

Mr. BRANDEIS. Yes.

Mr. DECKER. Why should not the people in that town get the benefit of a little competition among hardware merchants?

Mr. BRANDEIS. Because of the fact that by doing that you are ruining the plow business of those concerns. If it did not do any harm to cut the price, there would not be anybody complaining.

Mr. DECKER. What harm does it do to cut the prices?

Mr. BRANDEIS. That is what I have been trying to explain a dozen times in various ways, all bearing on the same general proposition, which is this: The practice of cutting prices on articles of a known price tends to create the impression among the consumers that they have been getting something that has not been worth what they have been paying for it.

Mr. DECKER. That is presuming that the people have not much sense.

Mr. BRANDEIS. Well, everybody has not as much sense as some people.

Mr. DECKER. Some people have more sense than other people think they have.

Mr. BRANDEIS. Cutting standard prices induces a retailer to give up a brand the price of which has been cut by his competitors, for the reason that it takes away from the retailer the incentive to sell it. Furthermore, it leads the retailer's customers to believe that he has been overcharging them. That is the experience of a very large number of retailers and manufacturers.

Now, this is not a matter on which to theorize. The men in favor of this law would not have been here insisting upon its passage and trying for several years to put it through if they had not been injured by a lack of ability to maintain prices. It is because they are injured that they demand relief. It is because of the inability to maintain standard prices that they have been injured. The retailer and the manufacturer want to have this thing stopped. Of course, if you were right in your assumption that the plow manufacturer is not injured by that price cutting, there would be no occasion for legislation. My point is that if the practice did not hurt them they would not be here complaining and they would not have endeavored elsewhere to secure this right; they would not have been spending large sums of money throughout the country endeavoring to protect their rights. They are not dreaming or imagining, but they have learned from experience. Unless the thing that they want in the exercise of their liberty is injurious to the public they ought to be protected. A man ought to be allowed to conduct his business as he sees fit as long as his method of proceeding is not injurious to the public.

The CHAIRMAN. As I understand your discussion with Mr. Barkley, you say that a manufacturer sells to a retailer a thousand plows at \$50 apiece. The retailer, I believe you say, sells them at \$85 apiece. Now, there are a thousand farmers in the community that want those plows. You say to them that they can get them cheaper but not as good. The retailer says that he can make enough profit on them if he sells them at \$75.

Mr. BRANDEIS. Yes.

The CHAIRMAN. You propose to make it illegal for the middleman who has cut his price to \$75 on each plow to deprive the farmer of the best plow he can get?

Mr. BRANDEIS. Yes; I will tell you why. I do not intend to prevent the dealer from selling the plow at a fixed price, because if he has a plow under an agreement, I want him to keep that agreement.

The CHAIRMAN. But you are proposing for us to make it illegal for the middleman who happens to be getting a bigger profit than he thinks he needs to split it up and let the other fellows share it.

Mr. BRANDEIS. I do not think that fully explains it.

Mr. BARKLEY. The two plows that I am acquainted with are the Oliver chilled plow and the Vulcan plow, which are used all over the United States.

Mr. BRANDEIS. I hope you have not forgotten the Avery plow, made in Louisville, Ky., where I come from.

Mr. BARKLEY. Yes; I know that, too. Now, these two plows are sold at different places at different prices, because of the ability of the dealers to make more money than others under different circumstances. Now, instead of your proposition being true that the public has been injured by the sale of these plows at different prices, is it not true that the quality of the plows has improved all the time and the public is getting the benefit of it?

Mr. BRANDEIS. Now, they may not fix the price—

Mr. BARKLEY (interposing). Well, I am not talking about that. In order to protect a man who makes Cornflakes, Unedda biscuits, or something of that kind, you would have us legislate to bring about the condition we have been discussing?

Mr. BRANDEIS. That is entirely aside from what we have been saying. I am not undertaking to say that every man who makes plows shall fix and maintain a standard price. Your people evidently did not fix their price.

Mr. BARKLEY. No.

Mr. BRANDEIS. Your plow business can go on to the end of time as it is being conducted now.

Mr. BARKLEY. Provided the manufacturer does not see fit to change his custom after this law went into effect, if it should be passed.

Mr. BRANDEIS. Oh, yes; but your manufacturer apparently did not. It was the law three years or so ago that the establishment of standard prices was legal.

Mr. BARKLEY. He may not have known it.

Mr. BRANDEIS. I guess the plow manufacturers knew it pretty well. They had good lawyers to tell them. They certainly knew their rights. You can be perfectly certain that there was not a large manufacturer in this country who did not have the question before him as to whether or not he should fix a resale price. Some men might think they ought to fix a resale price and others might think it would not be wise to do so. A might think he ought to fix the resale price and B might not think so, and both A and B might be right, because in some businesses it is desirable to fix the price and in other businesses it is not desirable to do so. But you and I can not determine what those particular businesses are in which it is desirable to fix a resale price. We must leave that to the man engaged in various businesses to decide for themselves. If they can make a success of it they will make a profit, but if they do not make a success they become bankrupt by reason of insufficient profits. Now, take your case and the case suggested by the chairman in regard to the plows. I would not require any plow manufacturer to fix a price. But if a plow manufacturer undertakes to say, "I am making this plow. It will do me and my business more harm to have Mr. Barkley cut the price on these 100 plows than I can make up in profits by selling 100 plows." Therefore I say I will not sell Mr. Barkley unless he is willing to sell on a basis that will not injure me any more than the sale benefits him. Mr. Barkley will know better than I whether it is to his advantage to purchase plows on the terms I offer him. If I find in my business that I have injured myself by making this sale to him, although he gives me a profit in the first instance, the consequences of selling to him will be worse to me than if I had never sold to him. With all due respect and affection to Mr. Barkley I would say, "I can not let you have these plows, Barkley, because it will hurt my trade. If you are willing to sell on the same basis as the other fellows, you can have them, but if not, I will not let you have them."

The CHAIRMAN. Ever since commerce began it has been a struggle to see how the producer and consumer can manage to live without letting the middleman

get a profit. It seems to me that your bill is for the purpose of compelling the middleman to make a profit.

Mr. BRANDEIS. No; it is not for the purpose of compelling anybody to make a profit, but simply to insist upon fair play as far as it is consistent with good business.

Mr. BARKLEY. Let us take a Manhattan shirt, which is a special brand of shirt and would come within the provisions of this bill. The only two cases in which a man is permitted under this bill to cut prices is where he has gone into bankruptcy or where there has been a fire.

Mr. BRANDEIS. Or where he has been otherwise damaged.

Mr. BARKLEY. Now, it is customary among merchants all over the country in the spring and fall to sell at cut prices the stock of goods they have left over. In other words, they would rather get the money immediately than pack those goods up until the next season. They will take a shirt made to sell at \$2.50 and sell it at a reduced price of \$1.85. If this bill should become a law, and the manufacturer of the Manhattan shirt should require the retailers to sell it at \$2.50, although the price cutting would be perfectly legitimate in order for the dealer to get in a new stock of goods, he could not do it.

Mr. BRANDEIS. Well, he would have a right to make or to refuse to make such a contract.

Mr. BARKLEY. Well, suppose the sale of the Manhattan shirt has been built up by its name and then the manufacturer will take advantage of the name which has been acquired by this shirt to compel the local merchants to sell it at the price he fixes.

Mr. BRANDEIS. He does not take any more advantage of the name than any lawyer does of his name. If a lawyer gets a reputation as a good lawyer by trying numerous cases successfully, he is very apt to raise the price of his services as his practice grows, though he may not be any better lawyer in 1915 than he was in 1905.

Mr. BARKLEY. But you would not prohibit a lawyer from reducing a fee for the benefit of a poor fellow who happened to be his client.

Mr. BRANDEIS. That would be a different case from anything we are considering here.

Mr. BARKLEY. But you would not say that we should prohibit his cutting prices?

Mr. BRANDEIS. Of course not; the case is wholly unlike that we are considering here. The law of Massachusetts, of New York, of Kentucky, for instance, permit contracts to establish standard prices. It is only in their interstate business that they are prohibited by reason of the Supreme Court decisions.

The CHAIRMAN. If their attention was called to the inadvertence, maybe they would correct it?

Mr. BRANDEIS. The Supreme Court of Washington has recently refused to follow the decision of the Supreme Court of the United States.

The CHAIRMAN. Why was it not enforced?

Mr. BRANDEIS. By whom?

The CHAIRMAN. The Supreme Court.

Mr. BRANDEIS. There is no power to do it.

The CHAIRMAN. I do not think the Supreme Court would allow a decision rendered through inadvertence to stand very long.

Mr. BRANDEIS. They may have their opinion as to what the public policy requires, but the body that should finally determine the public policy of the country is the National Congress.

Mr. TALCOTT. The Sanatogen case was decided only last year.

Mr. BRANDEIS. In May, 1912. I think Dr. Miles's case was decided earlier, and in that case the court laid down the principle which was afterwards applied in the Sanatogen case to patented articles.

Mr. TALCOTT. You were speaking this morning about unfair competition. You do not think this matter could be taken care of by the Federal Trade Commission?

Mr. BRANDEIS. I think not, in the ordinary case. I think that in view of the decision of the Supreme Court that the Federal Trade Commissioners would say that it was not the intention to change any existing rule.

The CHAIRMAN. The only two classes of people among my constituents who seem to have seen the literature of your league and referred it to me—

Mr. BRANDEIS (interposing). Oh, it is not my league any more than it is yours.

The CHAIRMAN. Your literature has been referred to me—

Mr. BRANDEIS (interposing). Not my literature. I have a very high regard for the members of that league—as much as you should have.

The CHAIRMAN. The only people who have seen the literature of your league and referred it to me are the jewelers and druggists.

Mr. BRANDEIS. Yes.

The CHAIRMAN. I suppose the druggists are interested in this matter on account of the patent medicines?

Mr. BRANDEIS. Oh, no; they are interested in it on account of a large number of articles which are not drug articles, but which they sell.

The CHAIRMAN. Have you discussed this matter with the patentees of any patent medicines?

Mr. BRANDEIS. I have not, sir; but I think they are as much interested as the others are.

The CHAIRMAN. A good many of those old nostrums have a warm place in my heart. I was wondering whether any of them were supporting this bill. Do the patent-medicine people want this bill?

Mr. BRANDEIS. Some do and some do not, I suppose. The number of people who are undertaking to establish standard prices is fairly small.

Mr. SIMS. Is it not a fact that a number of newspapers have a price printed on them, and in addition to that they say that if the papers are sold on trains they shall be sold at a higher price?

Mr. BRANDEIS. Yes.

Mr. SIMS. That would be in violation of the decision of the Supreme Court if it was applied.

Mr. BRANDEIS. I do not know about that.

Mr. SIMS. But the newspapers and magazines have fixed a definite price at which they shall be sold on trains.

Mr. BRANDEIS. I understand.

Mr. BARKLEY. I am constitutionally and inherently opposed to class legislation and legislation in behalf of special interests.

Mr. BRANDEIS. I think that is a very good predisposition.

Mr. BARKLEY. From the standpoint of fairness and justice and from a governmental standpoint, keeping in view the functions of the Government, is there any more justice in authorizing the manufacturer of specially branded articles to follow his products down to the consumer, whether the eater or the user, than there would be if you did the same thing with regard to the grower of wheat?

Mr. BRANDEIS. Yes; I think there is no difference in principle, but there is a great difference in the facts. Wheat is not sold to the consumer in original packages, and it is practically only to such articles that the Stevens bill applies. If you should ask me whether I think the grower of oranges should have a right to say that the oranges from the time they are packed by him until they reach the consumer shall be sold only at a given price, he having created a trade-mark on Jones's Delights, I will tell you that I think Jones ought to have a right to sell his oranges with the condition attached, "This is the price of this particular orange—this is the price at which it shall be sold."

Mr. DOREMUS. But you know as a matter of fact that the farmer can not fix the price of his products?

Mr. BRANDEIS. Not on wheat, but he may fix it on products packed so as to be sold as original packages to the consumer. He may pack grapes, apples, or pears, or a lot of other things, not peaches, perhaps, they being very perishable, but oranges or lemons.

The CHAIRMAN. In other words, you think it is impracticable and impossible to keep down competition with growers' products, whereas it is practicable and possible to do it with these other things.

Mr. BRANDEIS. No, sir; I think the contrary.

The CHAIRMAN. Well, if it works one way it ought to work the other. You are talking against theories, and yet you are the strongest theorist I have ever seen.

Mr. BRANDEIS. When a packer creates a definite mark by which his oranges are known, he should be protected.

The CHAIRMAN. Well, that is putting bits, bridle lines, and cruppers on business, and the people are not going to stand for it.

Mr. BRANDEIS. Oh, but farmers may create trade-marks just as well as the manufacturer creates his trade-marks. There is no reason why they should

not be protected, but when you have an article which is not branded and which can not be branded, you have a situation that takes care of itself.

The CHAIRMAN. Because that gives them an advantage that the others can not enjoy.

Mr. BRANDEIS. Everybody, according to his occupation, is subject to natural advantages or disadvantages. You are not asked to give anybody an advantage.

The CHAIRMAN. They have already got it.

Mr. BRANDEIS. I ask you not to take away any so-called advantage which a man has. You are not asked to give any privilege; you are asked not to impose on interstate commerce a restriction which is inconsistent with the public welfare.

Mr. ESCH. What effect would this bill have on the cost of living?

Mr. BRANDEIS. No very immediate effect of any kind.

Mr. ESCH. Either way?

Mr. BRANDEIS. Not much. In the long run it would tend to reduce the cost of living, because it encourages free competition.

Mr. DECKER. I can see why the retailer would be in favor of taking off this restriction.

Mr. BRANDEIS. Yes.

Mr. DECKER. Now, in regard to taking off the restriction as to the quantity of goods which may be sold at a given price, suppose one man has to buy on time from a wholesaler?

Mr. BRANDEIS. Well, the question of time would involve a different price. As a matter of fact, they do fix a different price with a discount for cash. They do not mean to say that a man who buys on six months' time is going to pay as much as the man who pays cash.

Mr. DECKER. Well, suppose you and I both buy from the same man on six months' time.

Mr. BRANDEIS. Yes.

Mr. DECKER. If we were both of equally good standing we would be supposed to get the same price at the same time?

Mr. BRANDEIS. Oh, yes.

Mr. DECKER. Now, I might be one of those fellows who, if I get my hands on the goods, will not pay for them right away and the man might want to charge me a little more to make up for it.

Mr. BRANDEIS. There ought not to be any limitation unless the exercise of that right of liberty of contract is doing more harm than good. The case which you cite is a perfectly proper case for consideration. The man who makes up his mind whether he is going to take advantage of this price making will have to make up his mind at the same time whether he will also accept the restriction of quantity which goes with it.

Mr. DECKER. Suppose we are convinced that the first part of your bill is pretty good, and I am inclined to think it is, but I am against the restriction on trade unless it is absolutely necessary. I think you can go a long ways on the second restriction.

Mr. BRANDEIS. Now, if the majority of the committee and Congress should think that that provision concerning quantity discounts was not wise, it could still pass the other provisions of the bill. But the provision concerning quantity discounts seems to me very desirable. However, these two provisions are separable.

Mr. DECKER. I want to ask you another question. There is no question but what some retailers throughout the country, perhaps the majority of them, are not making any more than they are entitled to, but it is a fact, nevertheless, that some retailers make an enormous profit. For instance, take the people who sell the Ford automobiles in this town. I expect they have made two or three hundred thousand dollars just selling them, and they have sold them at the same price that Ford has had them sold everywhere else in the United States.

Mr. BRANDEIS. Yes.

Mr. DECKER. Now, while these gentlemen would have been very glad to get a larger amount, they have been very well content to push their business by selling machines at half the amount.

Mr. BRANDEIS. Perhaps.

Mr. DECKER. Well, I know they would, because anybody would.

Mr. BRANDEIS. If they could have had it guaranteed to them.

Mr. DECKER. Well, guaranty or no guaranty. At any rate, it brings out this point, that Mr. Barkley has been pressing here: That you can take an article in Washington, where there is plenty of sale for it, and, on a \$500 price, I think the retailer will get \$30 profit. That is a good profit when you are going to sell 10,000 of them in a year. Out in my little town they have not so much of a profit. However, the machine sells for itself. Now, why should not the consumer in Washington get the benefit of it?

Mr. BRANDEIS. The answer to that, Mr. Decker, is simply this: Mr. Ford insists on telling us all the time that he is not a philanthropist, but that he has given \$10,000,000 to his people not because of charity but because he expects to get business results out of it. Exactly the same thing is true of his agents. Mr. Ford has succeeded in making for his firm \$25,000,000 a year because of his business judgment, and in the exercise of his judgment he has fixed the price of his machine and has fixed the terms upon which that machine can be sold. He is a business man. There is another business man next to him. Mr. Joy, who also has an interest in the automobile business and the Packard Motor Co., does a similar thing. You can go to motor manufacturers in Detroit and elsewhere and find that each has a different idea and exercises his judgment in his own way. We must not unnecessarily curb the free exercise of judgment by business men.

The CHAIRMAN. I am not familiar with the others, Mr. Brandeis, but Mr. Ford has filed a copy of his contract with this committee, and he is entirely within his rights. He does just exactly as a farmer would in selling a horse. He retains title to the property until it is finally sold and paid for.

Mr. BRANDEIS. Yes. Because he is so big a man that he can afford to do it.

The CHAIRMAN. And if any man wants to control the price of his product all he has to do is to retain title to it until it is all paid for?

Mr. BRANDEIS. But the rich man can do it. He has the necessary capital and is not very seriously affected by the existing rule; but the small manufacturer or dealer is.

The CHAIRMAN. Well, I have seen that done ever since I was 10 years old, on trades from \$10 up.

Mr. BRANDEIS. But it takes a great deal of money to do that.

The CHAIRMAN. Well, if a man has only a small boat he can only stay near the shore.

Mr. BRANDEIS. But the question is whether you should make laws which will let him sail farther to sea or continue to help only the big man, who does not need help.

The CHAIRMAN. I think business itself ought to establish most of its laws.

Mr. BRANDEIS. That is exactly what business wants to do. It wants you to permit it to establish its own laws.

The CHAIRMAN. I think I told you once before that it is a standing wonder to me what the world did for 6,000 years before Congress was established to fix these laws and regulations.

Mr. BRANDEIS. I think that is a very wise suggestion.

Mr. SIMS. Now, what difference does it make to the man who has to buy a Ford automobile, so far as the price is concerned, whether he is forced to accept it or not? Mr. Ford retains title and places these automobiles for sale at large, anywhere and everywhere, with a restriction of the sale price. How is the ultimate consumer to be benefited by forcing anybody to retain title?

Mr. BRANDEIS. Not in the least. The result is exactly the same now so far as the ultimate consumer is concerned.

Mr. DECKER. But if, when Mr. Ford started out to organize that business, this law had been as it is now, can you not see the possibility that Ford automobiles would have been cheaper than they are now?

Mr. BRANDEIS. I see the possibility that you would never have reached a Ford automobile. If this had been the law, and if Mr. Ford—as was the fact—had very little money and was not able to carry a large amount of goods, as he is to-day able to carry any amount of goods that he wants to, he would have been in a position where he could not have established his business because he did not have an immense amount of capital, which would have been necessary. The law, as declared by the majority of the Supreme Court, is a law that is playing into the hands of the big men, because they can go ahead in spite of it. You certainly do not wish to crush the little men.

Mr. DECKER. Why do you say that he could not extend his business? You said this morning that the secret of his great success was that he got on to the right thing at the right time—a thing that most everybody needed. Do

you not suppose that if he had got up that good little machine and sold it to retailers and let them compete among themselves, that he would have still reasonably prospered and the retailers would have gradually put down the price of the machine? Now, everybody admits that there is only one thing that will reduce the price of the Ford automobile, and that is Mr. Ford's own sweet will.

Mr. BRANDEIS. Well, the Ford automobile would never have existed except for the extraordinary ability of Mr. Ford to give an extraordinary machine for the money—a great deal better, it is said, than anybody else had been able to give for the same amount of money. Now, the same ability which he exercised with respect to the organization of his factory he exercised in the organization of his selling force and his selling methods. He concluded that a fixed standard price was an essential of his being able to run the business in this large way and give the best results to himself and to his customers.

Mr. DECKER. And to make that enormous profit I admit it is essential. I think it is a good thing for the country.

Mr. BRANDEIS. Yes; I think it is a remarkably good thing that he can give us such a machine for that amount of money.

The CHAIRMAN. At least he demonstrated his ability to do it without this law that you now suggest.

Mr. BRANDEIS. On the contrary, while his business was being built up the law was, or was supposed to be, what we are now contending Congress should make it. But you are not following my point. Mr. Ford having become a great capitalist does not need a large number of retailers. He can create agencies; he can provide the necessary capital, but the smaller manufacturers are not able to do so. By denying the right to establish standard prices the law injures the small manufacturers, the producers, and small retailers. This list of organizations all over the country, composed of hundreds of thousands of people, who are petitioning Congress to make this change shows that. What I urge you to do is remove the restrictions which the Supreme Court with the best of motives imposed, but which results in playing right into the hands of the monopolists. It is the small man who needs this legislation.

Mr. SIMS. Did not Mr. Ford become a large capitalist prior to this decision of the Supreme Court.

Mr. BRANDEIS. Certainly, and under the old law.

Mr. SIMS. Now, I have tried very hard to buy a Stacey-Adams shoe in the city of Washington, but I could not find one. I was told that it did not allow enough profit for a retailer to sell that shoe here, and finally I had to go to Nashville, Tenn., a town one-third the size of this town, in order to get a Stacey-Adams shoe. I can not get them in the city of Washington, a city of over 300,000 inhabitants, because they are not willing to sell at the price at which the manufacturer forces them to sell.

Mr. BARKLEY. Do you not think that is a very rare exception?

Mr. SIMS. I do not know.

Mr. BARKLEY. They are still selling the Stacey-Adams shoe and they have not declared dividends yet.

Mr. SIMS. And, furthermore, is it not a common practice for manufacturers, like Stacey, Adams & Co., to sell only to one retailer in a town so as to prevent the demoralization of prices?

Mr. BRANDEIS. That is what the Walkover, Douglas, and Regal shoe people do. Some of the concerns, like the Regal Shoe Co., have their own stores—a chain of some 100 or 150 stores.

Mr. SIMS. I was interested in the retail business at one time to the extent of being a part owner, and I know it was a common practice not to sell a certain line of goods to anybody except one dealer in a town, in order to prevent a demoralization and cutthroat prices.

Mr. BRANDEIS. I will show you how this cutthroat business has worked. Here is an instance I heard of the other day in New York. Some of the manufacturers of ladies' dress suits were telling of their experiences, and one manufacturer had sold suits to Marshall Field & Co. Marshall Field wrote a letter of great indignation, claiming they had sold these goods to another dealer in Michigan Avenue at a considerably lower price. They vowed they had not done it, but here were the goods themselves right in the window of the Michigan Avenue place offered for sale. It created a great deal of excitement and interest at the time. The manufacturer went there himself, found his goods, and then undertook to find out how it was that such a thing had happened. It proved that an order had been filled for a concern in Peoria, and the Peoria

concern instead of keeping the goods had sold them to the Michigan Avenue firm. And the manufacturer came very near losing Marshall Field & Co.'s trade. He had spent weeks in following up this matter, going to Peoria and doing a sort of detective work, trying to find out how his trade was going to ruin under this price cutting.

Now, that is the kind of a thing that the new manufacturer who is building up a trade is subjected to, and nobody gets any ultimate benefit from it. It is merely to satisfy the temporary demand of the price cutter for some illegitimate purpose. If you want to consider whose interests and whose rights are affected by this bill, just look at the people who want it and the people who do not want it.

Mr. DECKER. But where shall we look?

The CHAIRMAN. Look at the letters that they send back to you.

Mr. BRANDEIS. I will file with you a list of the national associations, State and local associations, representing hundreds of thousands of dealers, retailers, wholesalers, and manufacturers, and still others, who do not represent any special business, but all business, and which have considered this matter and expressed themselves on it. These men know, as business men, what their interest demands. On the other hand, who is opposing the Stevens bill? The men who have urged it in Congress are a few department-store men. I have not anything to say against the motives of those men, but they say, "This suits us; we like to cut; it helps us to cut." It may help them to cut prices, but it hurts the majority of the people. There is not anything that you are called upon to pass laws about on which there will not be some difference of opinion. When you passed the Sherman law and the Clayton bill you prevented some people from continuing to do certain things because it injured the great majority of the people. That is the situation here. The people who are objecting to this legislation are a comparatively few large concerns, urging you to allow them to continue a practice which is certainly dishonorable according to the standpoint of most men. If I sell goods to a man on the understanding that they should not be sold at less than a certain price, and mark the goods accordingly, he would not part with them unless he sells them at that price.

The CHAIRMAN. In connection with what you said about department stores, I want it to go in the record that this committee has not heard from any department stores.

Mr. BRANDEIS. The Judiciary Committee has heard from them.

The CHAIRMAN. This committee is considering the interest of a hundred million people who want competition.

Mr. BRANDEIS. The way to preserve competition is to regulate it. And there are no people who are so desirous of fair competition as these hundreds of thousand people who are represented by these various organizations in various States of the Union whose names I have here.

The CHAIRMAN. If you know any way to curtail the latitude of the department stores I think I would be in sympathy with you on that.

Mr. BRANDEIS. I do not want to curtail them in any respect except as to those practices that are unfair. I think we get the best results by leaving men ordinarily to do as they think best, by letting the department stores compete with the chain stores, the mail-order houses, and the small retail stores. But when you come across a practice which is unfair and which is injurious to a large number of people you should put a stop to that practice.

Mr. BARKLEY. Do you construe it to be an unfair practice where a man who has purchased something from somebody else and has the title to that article, whether it be a bar of soap or a wheat thrasher, to sell it to somebody else as long as he makes a fair profit? Is that fair or unfair?

Mr. BRANDEIS. It is very unfair if it is sold on a condition or agreement which the dealer then violated—

Mr. BARKLEY (interposing). Well, I am not asking you about that. The American principal is that a man can sell a thing for what he can get for it so long as he makes a fair profit.

Mr. BRANDEIS. I beg your pardon; that is not the American principle.

Mr. BARKLEY. Then what is it?

Mr. BRANDEIS. The American principle is that a man has a right to do anything he pleases with the article he buys unless he has an agreement with the man from whom he bought it that he shall do something else.

Mr. BARKLEY. Well, we might differ very radically as to whether the other man has the right to require that agreement of him, and it may be a question of honor—and it would be—as to the agreement which he made. I know if I



had such an agreement with a man I would live up to it. But regardless of that agreement is it an unfair practice?

Mr. BRANDEIS. If there is no agreement, either expressed or implied, then I would say that it would not be unfair.

Mr. BARKLEY. It would be unfair, however, if he did it for the purpose of driving somebody else out of business.

Mr. BRANDEIS. If what you are doing is of a nature which I think injures me and you know that I think it injures me and you know that I would not let this article get out of my hands except with the understanding that nothing shall be done which I think will injure me, then I think it is unfair, between man and man, to disregard my expressed condition or wishes. I do not see how anybody could justify such action. The dealer may refuse to enter into the agreement with me. He may say, "I do not want your goods on those terms," but if my goods go out and I say that these goods are put out upon the market with the understanding that they shall not be sold at less than 10 cents a package, he will do a dishonorable thing to sell them for less than 10 cents a package, in the ordinary dealing between man and man.

Mr. ESCH. Mr. Brandeis, this bill if passed would stabilize prices?

Mr. BRANDEIS. Certain prices.

Mr. ESCH. Now, even without it there have been a great many articles that have been put upon the market at stated prices, and those prices have been maintained for a great many years. There has been no elasticity in those prices; they do not fluctuate at all. Under the interstate-commerce law, as you well know, the orders of the commission upon all matters except for the payment of money shall last for a period not exceeding two years, the purpose of Congress being to permit a readjustment to meet the requirements of the order. There would be no such opportunity of readjustment under a stabilized price under this bill.

Mr. BRANDEIS. There would not be.

Mr. ESCH. The principle is "once fixed, always fixed."

Mr. BRANDEIS. Well, of course, that can not be true. Take the Kellogg Toasted Corn Flakes. They have kept their price but they have increased the quantity 50 per cent. Why did they do it? For the purpose of meeting competition. It was of value to them to have not only the name Kellogg but to have the same price, and they kept the price but gave the people more for their money. As long as you have a competitive business you will have this adjustment as a result of competition. If that is not done we are mistaken altogether in trying to preserve competition. I believe thoroughly in the efficacy of competition as a price regulator, provided you can regulate conditions so that competition will operate freely. Competition will not operate between an individual employee and a great corporation without the intervention of something like a labor union to equalize conditions between the two. There must therefore be some medium to equalize conditions before there can be competition. But when you have conditions favorable to competition we believe that competition is a safe regulator against excessive prices. Where there is a monopoly on one side you have different conditions, and the Stevens bill provides that monopolies should have no right to establish standard prices. But in view of the legislation that Congress has adopted, without regard to party, in the Clayton bill, it is safe to assume that competition is a good regulator, properly protected. I say that the Stevens bill is nothing more than an amplification and a special adaptation to a particular case of the general principles of competition and of preserving the liberty of contracts subject to those limitations which competition imposes.

I am afraid, Mr. Chairman, that I have imposed too long on the patience of this committee.

The CHAIRMAN. We have enjoyed very much your exceedingly interesting and learned discourse, and before it is printed we hope you will revise, extend, and enlarge upon it.

Mr. BRANDEIS. I shall be very glad to do so.

(List submitted by Mr. Brandeis.)

The following professional, commercial, and business men's organizations are among those which have indorsed the objects and aims of the Stevens bill:  
 American Iron, Steel, and Heavy Hardware Association.  
 American National Retail Jewelers' Association.  
 American Optical Association.  
 American Supply and Machinery Manufacturers' Association.  
 National Association Furniture Manufacturers.

National Association of Retail Druggists.  
National Association of Retail Grocers.  
National Association of Stationers and Manufacturers.  
National Cigar Leaf Tobacco Association.  
National Drug Trade Conference.  
National Home Furnishers' Association.  
National Leather and Shoe Finders' Association.  
National Lumber Manufacturers' Association.  
National Retail Hardware Association.  
National Wholesale Druggists' Association.  
National Wholesale Dry Goods Association.  
Patent and Enameled Leather Manufacturers' Association.  
Photographic Dealers' Association of America.  
Proprietary Association of America.  
Southern Supply and Machinery Dealers' Association.  
Travelers' Protective Association of America (Maryland division).  
United Commercial Travelers' Convention.  
Alabama State Retail Hardware Association.  
Alabama State Board of Pharmacy.  
California State Retail Grocers' and Merchants' Association.  
California State Retail Hardware Association.  
California State Pharmaceutical Association.  
Colorado State Jewelers' Association.  
Colorado State Retail Grocers' and Merchants' Association.  
Connecticut State Pharmaceutical Association.  
Delaware State Pharmaceutical Association.  
Florida State Pharmaceutical Association.  
Florida State Retail Hardware Association.  
Georgia State Pharmaceutical Association.  
Illinois State Pharmaceutical Association.  
Illinois State Retail Merchants' Association.  
Indiana State Pharmaceutical Association.  
Indiana State Retail Jewelers' Association.  
Iowa State Pharmaceutical Association.  
Iowa State Retail Merchants' Association.  
Kansas State Pharmaceutical Association.  
Kentucky State Pharmaceutical Association.  
Louisiana State Pharmaceutical Association.  
Maryland, Delaware and Virginia Peninsular Retail Jewelers' Association.  
Maryland State Pharmaceutical Association.  
Massachusetts State Pharmaceutical Association.  
Michigan State Retail Jewelers' Association.  
Michigan State Pharmaceutical Association.  
Michigan State Wholesale Grocers' Association.  
Michigan State Retail Hardware Association.  
Minnesota State Dealers' Association.  
Minnesota State Retail Grocers' and General Merchants' Association.  
Minnesota State Retail Hardware Association.  
Minnesota State Retail Implement Association.  
Minnesota State Retail Jewelers' Association.  
Minnesota State Optometrists' Association.  
Minnesota State Pharmaceutical Association.  
Mississippi State Retail Hardware Association.  
Missouri State Pharmaceutical Association.  
Missouri State Retail Merchants' Association.  
Montana State Pharmaceutical Association.  
Nebraska State Pharmaceutical Association.  
New Jersey State Retail Jewelers' Association.  
New Jersey State Pharmaceutical Association.  
New York State Hardware and Supply Dealers' Association.  
New York State Pharmaceutical Association.  
New York State Retail Grocers' Association.  
New York State Jewelers' Association.  
New York State Pharmaceutical Conference.  
New York State Wholesale Grocers' Association.  
Grand Forks (North Dakota) Association of Credit Men.  
Business Men's (Hyde Park, Massachusetts) Association.

Jackson (Michigan) Chamber of Commerce.  
 Jacksonville (Illinois) Retail Merchants' Association.  
 Junction City (Kansas) Commercial Club.  
 Lake View (Chicago, Illinois) Buying Club.  
 Larimore (North Dakota) Commercial Club.  
 Manitowoc (Wisconsin) Retailers' Association.  
 Memphis (Tennessee) Drug Club.  
 Minot (North Dakota) Association of Commerce.  
 Montgomery (Alabama) Business Men's League.  
 Nashua Board of Trade (New Hampshire).  
 Metropolitan (New York City) Association of Retail Druggists.  
 New Orleans (Louisiana) Association of Commerce.  
 Orleans (New Orleans, Louisiana) Parish Pharmaceutical Association.  
 Palatka Board of Trade (Florida).  
 Philadelphia United Business Men's Association.  
 Pueblo (Colorado) Retail Butchers' and Grocers' Association.  
 Newark Hardware and Supply Association (New Jersey).  
 Retailers' Mass Meeting (New York City).  
 Photographic (New York City) Dealers' Association.  
 New York Stationers' Association.  
 Salem (Massachusetts) Board of Trade.  
 San Antonio (Texas) Chamber of Commerce.  
 San Diego (California) Merchants' Association.  
 Seattle (Washington) Retail Grocers' Association.  
 St. Paul (Minnesota) Retail Druggists' Association.  
 St. Paul (Minnesota) Retail Grocers' Association.  
 Spokane (Washington) Local Druggists' Association.  
 Spokane (Washington) Grocers' Association.  
 Tacoma (Washington) Association of Credit Men.  
 Mercer County (New Jersey) Retail Druggists.  
 Waterloo (Iowa) Commercial Club.  
 Waterloo (Wisconsin) Commercial Club and Board of Trade.  
 West Side (Chicago, Illinois) Buying Club.  
 North Carolina State Pharmaceutical Association.  
 North Dakota State Pharmaceutical Association.  
 North Dakota State Retail Jewelers' Association.  
 Ohio State Convention and Style Show.  
 Ohio State Hardware Association.  
 Ohio State Pharmaceutical Association.  
 Ohio State Retail Jewelers' Association.  
 Ohio State Retail Grocers' Association.  
 Ohio Valley Retail Druggists' Association.  
 Oklahoma State Retail Jewelers' Association.  
 Oregon State Retail Jewelers' Association.  
 Pennsylvania State Retail Jewelers' Association.  
 Pennsylvania State Pharmaceutical Association.  
 Pennsylvania State Retail Merchants' Association.  
 South Dakota State Pharmaceutical Association.  
 South Dakota State Retail Merchants' Association.  
 Texas State Retail Jewelers' Association.  
 Utah State Retail Merchants' Association.  
 Virginia State Merchants' Association.  
 Virginia State Retail Jewelers' Association.  
 Washington State Retail Jewelers' Association.  
 Washington State Retail Merchants' Association.  
 Washington State Retailers' Association.  
 Western (Seattle, Washington) Association of Retail Cigar Dealers.  
 West Virginia State Retail Jewelers' Optical Association.  
 Wisconsin State Retail Jewelers' Association.  
 Wisconsin State Retail Grocers' and General Merchants' Association.  
 Wisconsin State Pharmaceutical Association.  
 Abilene (Kansas) Business Men's Association.  
 Ballard (Seattle, Washington) Retail Grocers' Association.  
 Brooklyn Retail Grocers' Association.  
 Delhi (New York) Commercial Club.  
 Denver (Colorado) Retail Grocers' Association.  
 Iowa (Des Moines) Jewelers' Association.

Iowa (Des Moines) Association of Optometrists.  
 Elmira (New York) Druggists' Association.  
 Family Wine Liquor Dealers' Protective Association (New York City).  
 Fond du Lac (Wisconsin) Retail Grocers' Association.

[Harper's Weekly for Nov. 15, 1913.]

### CUTTHROAT PRICES—THE COMPETITION THAT KILLS.

By LOUIS D. BRANDEIS.

"I can not believe," said Mr. Justice Holmes, "that in the long run the public will profit by this course, permitting knaves to cut reasonable prices for mere ulterior purposes of their own, and thus to impair, if not destroy, the production and the sale of articles which it is assumed to be desirable the people should be able to get."

Such was the dissent registered by this forward-looking judge when, two years ago, the Supreme Court of the United States declared invalid contracts by which a manufacturer of trade-marked goods sought to prevent retailers from cutting the price he had established.<sup>1</sup> Shortly before, the court had held that mere possession of a copyright did not give the maker of an article power to fix by notice the price at which it should be sold to the consumer.<sup>2</sup> And now the court, by a 5 to 4 decision, has applied the same rule to patented articles, thus dealing a third blow at the practice of retailing nationally advertised goods at a uniform price throughout the country.<sup>3</sup>

Primitive barter was a contest of wits instead of an exchange of ascertained values. It was, indeed, an equation of two unknown quantities.

Trading took its first great advance when money was adopted as the medium of exchange. That removed one-half of the uncertainty incident to a trade, but only one-half. The transaction of buying and selling remained still a contest of wits. The seller still gave as little in value and got as much in money as he could. And the law looked on at the contest, declaring solemnly and ominously: "Let the buyer beware." Within ample limits the seller might legally lie with impunity; and, almost without limits, he might legally deceive by silence. The law gave no redress because it deemed reliance upon sellers' talk unreasonable, and not to discover for one's self the defects in an article purchased was ordinarily proof of negligence. A good bargain meant a transaction in which one person got the better of another. Trading in the "good old days" imposed upon the seller no obligation either to tell the truth, or to give value, or to treat all customers alike. But in the last generation trade morals have made great strides. New methods essential to doing business on a large scale were introduced. They are time-saving and labor-saving, and have proved also conscience-saving devices.

The greatest progress in this respect has been made in the retail trade; and the first important step was the introduction of the one-price store. That eliminated the constant haggling about prices, and the unjust discrimination among customers. But it did far more. It tended to secure fair prices; for it compelled the dealer to make, deliberately, prices by which he was prepared to stand or fall. It involved a publicity of prices which invited a comparison in detail with those of competitors; and it subjected all his prices to the criticism of all his customers. But while the one-price store marked a great advance, it did not bring the full assurance that the seller was giving value. The day's price of the article offered was fixed and every customer was treated alike; but there was still no adequate guaranty of value, both because there was ordinarily no recognized standard of quality for the particular article and because there was no standard price even for the article of standard quality.

Under such conditions the purchaser had still to rely for protection on his own acumen, or on the character and judgment of the retailer; and the individual producer had little encouragement to establish or to maintain a reputation. The unscrupulous or unskillful dealer might be led to abandon his goods for

<sup>1</sup> Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S., 409.

<sup>2</sup> Bobbs Merrill Co. v. Straus, 210 U. S., 339.

<sup>3</sup> Bauer v. O'Donnell, 229 U. S., 1.

cheaper and inferior substitutes. This ever-present danger led to an ever-widening use of trade-marks. Thereby the producer secured the reward for well doing and the consumer the desired guaranty of quality. Later the sale of trade-marked goods at retail in original packages supplied a further assurance of quality, and also the assurance that the proper quantity was delivered. The enactment of the Federal pure-food law and similar State legislation strengthened these guaranties.

But the standard of value in retail trade was not fully secured until a method was devised by which a uniform retail selling price was established for trade-marked articles sold in the original package. In that way, widely extended use of a trade-marked article fostered by national advertising could create both a reputation for the article and a common knowledge of its established selling price or value. With the introduction of that device the evolution of the modern purchase became complete. The ordinary retail sale—the transaction which had once been an equation of two unknown quantities—became an equation of two known quantities. Uncertainty in trade is eliminated by “A dollar and the Ingersoll watch,” or “Five cents and the Uneeda Biscuits.”

#### THE COURT'S PROHIBITION.

Such is the one-price system to which the United States Supreme Court denied its sanction. The courts of Great Britain had recognized this method of marketing goods as legal. The Supreme Court of Massachusetts had approved it. The Supreme Court of California has wholly approved it. The system was introduced into America many years ago, and has become widely extended. To abandon it now would disturb many lines of business and seriously impair the prosperity of many concerns.

When the United States Supreme Court denied to makers of copyrighted or patented goods the power to fix by notice the prices at which the goods should be retailed, the court merely interpreted the patent and copyright acts and declared that they do not confer any such special privilege. But when the court denied the validity of contracts for price-maintenance of trade-marked goods, it decided a very different matter. It did not rest its decision upon the interpretation of a statute; for there is no statute which in terms prohibits price maintenance, or, indeed, deals directly with the subject. It did not refuse to grant a special privilege to certain manufacturers; it denied a common right to all producers. Nor does the decision of the court proceed upon any fundamental or technical rule of law. The decision rests upon general reasoning as to public policy; and that reasoning is largely from analogy.

#### THE DEMANDS OF PUBLIC POLICY.

When a court decides a case upon grounds of public policy, the judges become, in effect, legislators. The question then involved is no longer one for lawyers only. It seems fitting, therefore, to inquire whether this judicial legislation is sound—whether the common trade practice of maintaining the price of trade-marked articles has been justly condemned. And when making that inquiry we may well bear in mind this admonition of Sir George Jessel, a very wise English judge:

“If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract.”

#### THE COURT'S OBJECTION.

The Supreme Court says that a contract by which a producer binds a retailer to maintain the established selling price of his trade-marked product is void, because it prevents competition between retailers of the article and restrains trade.

Such a contract does, in a way, limit competition; but no man is bound to compete with himself. And when the same trade-marked article is sold in the same market by one dealer at a less price than by another, the producer, in effect, competes with himself. To avoid such competition the producer of a trade-marked article often sells it to but a single dealer in a city or town, or he establishes an exclusive sales agency. No one has questioned the legal right of an in-

dependent producer to create such exclusive outlets for his product. But if exclusive selling agencies are legal, why should the individual manufacturer of a trade-marked article be prevented from establishing a marketing system under which his several agencies for distribution will sell at the same price? There is no difference in substance between an agent who retails the article and a dealer who retails it.

For many business concerns the policy of maintaining a standard price for a standard article is simple. The village baker readily maintained the quality and price of his product by sale and delivery over his own counter. The great Standard Oil monopoly maintains quality and price (when it desires so to do) by selling throughout the world to the individual customer from its own tank wagons; but for most producers the jobber and the retailer are the necessary means of distribution—as necessary as the railroad, the express, or the parcel post. The Standard Oil Co. can without entering into contracts with dealers maintain the price through its dominant power. Shall the law discriminate against the lesser concerns, which have not that power, and deny them the legal right to contract with dealers to accomplish a like result? For, in order to insure to the small producer the ability to maintain the price of his product, the law must afford him contract protection when he deals through the middleman.

But the Supreme Court says that a contract which prevents a dealer of trade-marked articles from cutting the established selling price restrains trade. In a sense every contract restrains trade, for after one has entered into a contract he is not as free in trading as he was before he bound himself, but the right to bind one's self is essential to trade development. And it is not every contract in restraint of trade, but only contracts unreasonably in restraint of trade, which are invalid. Whether a contract does unreasonably restrain trade is not to be determined by abstract reasoning. Facts only can be safely relied upon to teach us whether a trade practice is consistent with the general welfare. And abundant experience establishes that the one-price system, which marks so important an advance in the ethics of trade, has also greatly increased the efficiency of merchandising not only for the producer but for the dealer and the consumer as well.

#### THE PRODUCERS' PLEA.

If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principles—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer. Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

#### CUT PRICES—THE "MISLEADER."

When a trade-marked article is advertised to be sold at less than the standard price, it is generally done to attract persons to the particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a "leader." But the cut-price article would more appropriately be termed a "misleader," because ordinarily the very purpose of the cut price is to create a false impression.

The dealer who sells the dollar Ingersoll watch for 67 cents necessarily loses money in that particular transaction. He has no desire to sell any article on which he must lose money. He advertises the sale partly to attract customers to his store; but mainly to create in the minds of those customers the false impression that other articles in which he deals and which are not of a standard or known value will be sold upon like favorable terms. The customer is expected to believe that if an Ingersoll watch is sold at 33½ per cent less than others charge for it, a ready-to-wear suit or a gold ring will be sold as cheap. The more successful the individual producer of a trade-marked article has been in creating for it a recognized value as well as a wide sale, the greater is the temptation to the unscrupulous to cut the price. Indeed a cut-price article can ordinarily be effective as a "misleader" only when both the merits and the established selling price are widely known.

## HOW CUT PRICES HURT.

The evil results of price cutting are far-reaching. It is sometimes urged that price cutting of a trade-marked article injures no one; that the producer is not injured, since he received his full price in the original sale to jobber or retailer; and indeed may be benefited by increased sales, since lower prices ordinarily stimulate trade; that the retailer can not be harmed, since he has cut the price voluntarily to advance his own interests; that the consumer is surely benefited because he gets the article cheaper. But this reasoning is most superficial and misleading.

To sell a dollar Ingersoll watch for 67 cents injures both the manufacturer and the regular dealer; because it tends to make the public believe that either the manufacturer's or the dealer's profits are ordinarily exorbitant; or, in other words, that the watch is not worth a dollar. Such a cut necessarily impairs the reputation of the article and, by impairing reputation, lessens the demand. It may even destroy the manufacturer's market. A few conspicuous "cut-price sales" in any market will demoralize the trade of the regular dealers in that article. They can not sell it at cut prices without losing money. They might be able to sell a few of the articles at the established price; but they would do so at the risk to their own reputations. The cut by others, if known, would create the impression on their own customers of having been overcharged. It is better policy for the regular dealer to drop the line altogether. On the other hand, the demand for the article from the irregular dealer who cuts the price is short lived. The cut price article can not long remain his "leader." His use for it is sporadic and temporary. One "leader" is soon discarded for another. Then the cut-price outlet is closed to the producer, and, meanwhile, the regular trade has been lost. Thus a single prominent price cutter can ruin a market for both the producer and the regular retailer. And the loss to the retailer is serious.

On the other hand, the consumer's gain from price cutting is only sporadic and temporary. The few who buy a standard article for less than its value do benefit—unless they have, at the same time, been misled into buying some other article at more than its value. But the public generally is the loser; and the losses are often permanent. If the price cutting is not stayed, and the manufacturer reduces the price to his regular customers in order to enable them to retain their market, he is tempted to deteriorate the article in order to preserve his own profits. If the manufacturer can not or will not reduce his price to the dealer, and the regular retailers abandon the line, the consumer suffers at least the inconvenience of not being able to buy the article.

## PRICE MAINTENANCE IS NOT PRICE FIXING.

The independent producer of an article which bears his name or trade-mark—be he manufacturer or grower—seeks no special privilege when he makes contracts to prevent retailers from cutting his established selling price. The producer says in effect: "That which I create, in which I embody my experience, to which I give my reputation, is my property. By my own effort I have created a product valuable not only to myself, but to the consumer; for I have endowed this specific article with qualities which the consumer desires, and which the consumer should be able to rely confidently upon receiving when he purchases my article in the original package. To be able to buy my article with the assurance that it possesses the desired qualities, is quite as much of value to the consumer who purchases it as it is of value to the maker who is seeking to find customers for it. It is essential that the consumers should have confidence not only in the quality of my product, but in the fairness of the price he pays. And to accomplish a proper and adequate distribution of product guaranteed both as to quality and price, I must provide by contract against the retail price being cut."

The position of the independent producer who establishes the price at which his own trade-marked article shall be sold to the consumer must not be confused with that of a combination or trust which, controlling the market, fixes the price of a staple article. The independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition. The consumer who pays the price established by an independent producer in a competitive line of business does so voluntarily; he pays the price asked, because

he deems the article worth that price as compared with the cost of other competing articles. But when a trust fixes, through its monopoly power, the price of a staple article in common use, the consumer does not pay the price voluntarily. He pays under compulsion. There being no competitor he must pay the price fixed by the trust, or be deprived of the use of the article.

Price cutting has, naturally, played a prominent part in the history of nearly every American industrial monopoly.

Commissioner Herbert Knox Smith found, after the elaborate investigation undertaken by the Federal Bureau of Corporations, that—

"One of the most effective means employed by the Standard Oil Co. to secure and maintain the large degree of monopoly which it possesses is the cut in prices to the particular customers or in the particular markets of its competitors while maintaining them at a higher level elsewhere."

And Chief Justice White, in delivering the opinion of the United States Supreme Court in the Tobacco Trust case, said:

"\* \* \* the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued."

Therefore recent legislative attempts to stay monopoly commonly include in some form prohibition against the making of cutthroat prices with a view to suppressing competition. Such provisions will be found in the bills proposed by Senator La Follette, Congressman Stanley, and Senator Cummins to supplement the Sherman antitrust law; and statutes dealing with the subject have been enacted in several States.

President Wilson urged most wisely that instead of sanctioning and regulating private monopoly, we should regulate competition. Undoubtedly statutes must be enacted to secure adequate and effective regulation; but shall our courts prohibit voluntary regulation of competition by those engaged in business? And is not the one-price system for trade-marked articles a most desirable form of regulation?

#### PRICE CUTTING—THE ROAD TO MONOPOLY.

The competition attained by prohibiting the producer of a trade-marked article from maintaining his established price offers nothing substantial. Such competition is superficial merely. It is sporadic, temporary, delusive. It fails to protect the public where protection is needed. It is powerless to prevent the trust from fixing extortionate prices for its product. The great corporation with ample capital, a perfected organization, and a large volume of business, can establish its own agencies or sell direct to the consumer, and is in no danger of having its business destroyed by price cutting among retailers. But the prohibition of price maintenance imposes upon the small and independent producers a serious handicap. Some avenue of escape must be sought by them, and it may be found in combination. Independent manufacturers without the capital or the volume of business requisite for engaging alone in the retail trade will be apt to combine with existing chains of stores or to join with other manufacturers similarly situated in establishing new chains of retail stores through which to market their products direct to the consumer. The process of exterminating the small independent retailer, already hard pressed by capitalistic combinations—the mail-order houses, existing chains of stores, and the large department stores—would be greatly accelerated by such a movement. Already the displacement of the small independent business man by the huge corporation with its myriad of employees, its absentee ownership, and its financial control, presents a grave danger to our democracy. The social loss is great, and there is no economic gain. But the process of capitalizing free Americans is not an inevitable one. It is not even in accord with the natural law of business. It is largely the result of unwise, man-made, privilege-creating law, which has stimulated existing tendencies to inequality instead of discouraging them. Shall we, under the guise of protecting competition, further foster monopoly by creating immunity for the price cutters?



## MONOPOLY'S EASIEST WAY.

Americans should be under no illusions as to the value or effect of price cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted frequently. It is so simple, so effective. Farseeing organized capital secures by this means the cooperation of the shortsighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.

**TESTIMONY OF HON. JAMES S. HARLAN, A MEMBER OF THE INTERSTATE COMMERCE COMMISSION.**

(The witness was sworn by Senator Chilton.)

Senator CHILTON. Mr. Harlan, how long have you known Mr. Louis D. Brandeis?

Mr. HARLAN. Well, about 45 years, I should say; when I was a boy in Kentucky I knew him.

Senator CHILTON. Mr. Harlan, Louis D. Brandeis was employed by the Interstate Commerce Commission in the matter of the Five Per Cent Rate Advance case?

Mr. HARLAN. Yes, sir.

Senator CHILTON. You wrote a letter to him under date of August 15, 1913. Have you a copy of that letter?

Mr. HARLAN. I have what I think is the original carbon copy.

Senator CHILTON. Is that the full letter?

Mr. HARLAN. I have the full letter here, Senator.

Senator CHILTON. Will you produce it for the benefit of the committee?

Mr. HARLAN. Yes, sir [producing letter].

Senator CHILTON. Would you object to putting this full letter into the record?

Mr. HARLAN. No, sir.

Senator CHILTON. Somebody asked for that letter the other day, and I think it was Senator Borah. Without objection, this full letter will go into the record, and when it has been copied this carbon will be returned to you.

(The letter referred to is here printed in full as follows:)

AUGUST 15, 1913.

MY DEAR MR. BRANDEIS: Your letter of July 18 reached me on the 23d of that month while in Washington attending a midsummer conference. I was much interested in it because the commission had already actively taken up the question of depreciation of equipment with a view to a general enforcement of the requirements of our accounting classifications in that regard. Although I did not share in the doubts of the commission as to our control over the matter as an accounting question, my colleagues for a long time hesitated to take any affirmative stand; but the recent decisions of the Commerce Court and the Supreme Court in the Kansas City Southern case seem to leave no ground for further discussion. A month or two ago I took the matter up with several of the more prominent lines, and it is our purpose to follow it up closely. As a matter of fact only a few of the carriers are in default with respect to our regulations in the matter of depreciation. Our efforts in the past have been directed chiefly toward the general adoption of the principle of depreciation, without undertaking to specify the amount to be set up by the individual carriers. By this time, however, they ought to have accumulated sufficient experience not only to set up a definite amount, but, as you suggest, specifically to indicate in their returns how their charges for depreciation are made. The commission for some time has had under consideration several proposed changes in the annual report form, and a blank has been provided in which the carriers will be expected to state the basis of arriving at their depreciation charges. It is not

improbable that the form containing these requirements will be used by the carriers in stating their amounts for the current fiscal year.

The commission has asked me to take charge of the Rate Advance case. We are of course aware of the fact that the carriers will not fail fully to present their side of the case and the commission has felt that every effort should be made, in the public interest, adequately to present the other side. Would you care to undertake that burden? As you are already aware, in a number of cases of large importance and wide interest special counsel have been retained by the commission. As a matter of fact that has not been their real relation in these controversies. They have been retained by the commission, not as advocates or to support any special theory of the issues involved, but as a means by which the commission might be advised of all the facts and not have to decide the issue upon a record made up largely in one interest. It is with this general thought in mind that the commission has reached the conclusion that in the Rate Advance case special counsel should be retained, and I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record, without advocating any particular theory for its disposition. In making this last observation you will of course understand that you will be expected to emphasize any aspect of the case which in your judgment, after an examination of the whole situation, may require emphasis. The commission, however, wishes to avoid a record based solely on a particular view or theory.

The commission will be gratified to learn in the very near future that you will be able to take part in the proceeding. My personal feeling is that your participation in the case will give to the public at large the assurance that the whole case will be fully presented, and I very much hope that you will acquiesce in the commission's wishes in the matter.

Very sincerely yours,

JAMES S. HARLAN, *Commissioner*.

MR. LOUIS D. BRANDEIS,  
161 Devonshire Street, Boston, Mass.

Senator CHILTON. After the employment of Mr. Brandeis, will you state to the committee what he did under that employment?

Mr. HARLAN. The letter that has just been offered in evidence was written by me in the summer after the adjournment of the commission, and Mr. Brandeis in his reply asked how soon we would desire him to commence the work. My recollection is that in replying to his letter I indicated that the commission would reassemble in October, and as soon after as possible I would ask him to come down to Washington for a conference with me in reference to the matter. Just when he did come I do not now recollect, but my impression is that he came during the month of October and remained there, if not on that visit, at the next one, which took place shortly afterwards, practically all the time until the conclusion of the case.

Senator CHILTON. I recall it was testified some place in the record that it occupied probably a year and a half.

Mr. HARLAN. I should say a year; I think that is more accurate.

Senator CHILTON. Did he have assistants?

Mr. HARLAN. All of my office force was engaged in the case and also a part of the force of what we call our 'Division of Carriers' Accounts; in fact, quite a substantial number of the examiners in that division were assigned to the case.

Senator CHILTON. Is it true that in your practice—I mean in the conduct of the business of the commission—you, in a way, divide up the work during this process of investigating when you are receiving the facts? When it comes to a final hearing you divide up the work, do you not, among the examiners?

Mr. HARLAN. Do you refer to a particular case or to the general work of the commission?

Senator CHILTON. I want to know whether or not any one particular commissioner had special charge of this case prior to its final hearing before the commission?

Mr. HARLAN. Yes; the commission instructed me to take the case on my docket and to conduct the investigation. It was done under my personal supervision.

Senator CHILTON. And you employed Mr. Brandeis for the purposes set forth in this letter?

Mr. HARLAN. Yes.

Senator CHILTON. Did you employ him—was it your understanding that he was employed—to represent any one side or to represent the commission?

Mr. HARLAN. May I take that letter, Senator? The first part of it has no relation to this case. The second part of it, which is the only part that I find here in the printed record, deals with the Five Per Cent case.

Let me say this, if I may, in my own way, that after the case was first assigned to me by the commission one of the first questions that was discussed by us in conference was whether or not we ought to retain counsel, in accordance with the precedent in other similar cases, to undertake the development of a complete record. Curiously enough, I was opposed to the employment of outside counsel, because I thought that our own force perhaps would suffice; but the judgment of the commission was to the contrary, and thereupon, after talking the matter over, we agreed to ask Mr. Brandeis to undertake the work, and I was asked to open the matter up with Mr. Brandeis. I was not able to do this at once, because we were then very much crowded with work we wanted to dispose of before the summer recess; so that it was not until after the adjournment of the commission, as I indicated a moment ago, that I wrote this letter to Mr. Brandeis. In it I endeavored to explain what I took to be the general purpose of the commission in retaining an attorney in the case; we knew that the carriers for months had been preparing and would be able, of course, to present their case very fully; we thought there was a large public interest involved and that unless some one of ability and familiarity with such matters were designated to represent the public interests the record probably would be a one-sided record. And so, in asking Mr. Brandeis whether he was ready to undertake the task, I endeavored in the letter to point out the purpose of the commission in enlisting his services. It was to undertake to see that all phases of the matter were investigated and properly presented upon the record that would finally be submitted to the commission.

There is one portion of the letter that I think perhaps has been misunderstood. Commencing in the middle of a sentence, I say:

I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record, *without advocating any particular theory for its disposition.*

[NOTE.—Italicized portions were so marked by Mr. Harlan in revision.]

Then I later add:

The commission, however, wishes to avoid a record based *solely on a particular view or theory.*

Those phrases, as I understand it, have been the subject of some comment and apparently have been misunderstood.

You may recall that in 1910 we had two similar cases of great importance, one known as the Western Rate Advance case and the other known as the Eastern Rate Advance case. Mr. Brandeis participated in those cases, and some of you, if not all of you, may recall that the feature of particular interest in both cases, from the standpoint of the public and the newspapers, was Mr. Brandeis's theory that through "efficiency" the railroads might make very large savings—I think he indicated some amount per day—and in that way might avoid the necessity of an increase in their rates. It was a very interesting lot of testimony that Mr. Brandeis produced. My own view is that the discussion and publicity that was given to the matter of efficiency did a great deal of good. While we did not use that theory at all in disposing of either case, I have since been told repeatedly by railroad men and others that the discussion of that matter in those cases resulted in an undertaking by many railroad men to study the questions of efficiency and to see what savings could be made.

I do not doubt for a moment that great good was accomplished by that testimony and the wide publicity then given to "scientific management and efficiency." But obviously the commission could not dispose of the *1910 Rate advance cases* on a theory of that kind, and did not. Nor did Mr. Brandeis advocate their disposition solely on that theory. Nevertheless that discussion of efficiency seemed to have become in the public mind the central feature of those cases. And when the *Five Per Cent case* came forward it did not seem to us wise to have a record made up on any special theory of that kind; and the two sentences or clauses in my letter to Mr. Brandeis that I have just called your attention to refer to the theory of efficiency which he had made somewhat prominent in the previous cases and were intended to caution him against a record in the *Five Per Cent case* based solely on a particular view or theory of that kind. That was the thought in my mind when writing the letter, as I explained to Mr. Brandeis when I first saw him afterwards. In other words, my purpose was to indicate to him that we wanted a broad record, such as a court might require, when it had great interests to dispose of as we had in the *Five Per Cent case*, and that we did not want a particular theory that some might regard, possibly, as fanciful to be the distinguishing feature of the record.

Senator CHILTON. Was the evidence which was secured by you and by Mr. Brandeis at the disposal of both sides of the case?

Mr. HARLAN. Oh, these were public hearings, Senator.

Senator CHILTON. I mean this—

Mr. HARLAN. I conducted them all. Counsel were there all the time.

Senator CHILTON. There was no source of information that you had that was not at the disposal of one side as much as the other, and any reports that you had were gotten just as much for one side of the case as they were for the other, were they not?

Mr. HARLAN. If I understand your question, there is but one answer to make, and that is that that was the case. Of course, our accounting examiners were put on the case, and I suppose they have bushels of what we call "working papers" that no one excepting

those examiners has seen or has cared to see; but all the compilations that were based on those working papers and used in the case are public records. In fact, they have been published under a Senate resolution.

Senator CHILTON. Yes; I understand that. Here is what I mean to say. I want to get it to you. The impression has come, whether it has to the members of the committee or not, that there were two big sides of that case; that on the one side were the railroads and on the other side were the shippers; and that Mr. Brandeis owed certain duties to the shippers that he did not owe to the railroads. Was there any condition of that kind there, or was that an investigation that was participated in by everybody, and in which your information was at the disposal of everybody.

Mr. HARLAN. Why, Senator, I do not know of any information in the case that was not and is not now at the disposal of anyone who desires to see it. The working papers that I speak of perhaps would not be called public documents, but all the compilations based upon them were certainly public documents.

The first part of your question was whether there were two sides to the case. Of course there were two sides to the case. There was the railroad side and there was the shippers' side, and both sides were very ably represented. But I do not understand that Mr. Brandeis was on either side. He was there in the public interest. Under the terms of his employment his duty was to develop all the facts that seemed to be of value in enabling the commission to reach a conclusion, and in the presentation of the case to give the commission the benefit of his best judgment on those facts. It never occurred to me that he represented one side or the other.

Senator CHILTON. Were his services satisfactory to the commission?

Mr. HARLAN. I do not think the commission has ever discussed that question in just that way. But, if I may speak for the commission, I should say they were eminently so. He gave practically a year's time to the case, to the exclusion of everything else so far as I could see. I never knew anyone to work more zealously or to give more of his whole thought and soul to the solution of a problem than he did in that case. I think we got from him, and the public got from him, the best that was in him.

Senator CHILTON. Was there any surprise on the part of the commission at any opinion he expressed in the case?

Mr. HARLAN. During the argument?

Senator CHILTON. Yes.

Mr. HARLAN. I do not know that there was any surprise. You refer to his opening?

Senator CHILTON. I refer to what has been criticized here by Mr. Thorne.

Mr. HARLAN. I do not think that the commission was in a state of mind to be surprised. Their minds were judicially open on the question, as they should have been, of course. What you refer to came in the course of the argument. I have never heard it criticized by any of my colleagues.

Senator CHILTON. Does any other member of the committee want to ask Mr. Harlan any questions?

Senator WORKS. Mr. Harlan, as I understand you, Mr. Brandeis was called into that investigation in the public interest?

Mr. HARLAN. Yes, Senator.

Senator WORKS. You felt that probably the railroad people would be adequately prepared, and that the other side—that in effect represented the public interests—would not be prepared to present the case as it should be presented?

Mr. HARLAN. Yes.

Senator WORKS. It was upon that theory that Mr. Brandeis was employed by the commission, was it not?

Mr. HARLAN. Yes; that we should not have a one-sided record but should have a full and complete record.

Senator WORKS. In the investigation, with whom did he act and advise?

Mr. HARLAN. Well, he had under him—

Senator WORKS. No; I mean among the counsel who were acting there.

Mr. HARLAN. That I do not know. Mr. Thorne was there, of course, at most of the hearings if not all of them, and—well, there were half a dozen attorneys, Senator; different counsel. Mr. Thorne was perhaps the most prominent of the other attorneys in the case.

Senator WORKS. When you came to divide up the time Mr. Brandeis's time was taken out of that of the shippers, was it not?

Mr. HARLAN. I do not recall, Senator, about that.

Senator WORKS. Is it not a fact that through the entire investigation he worked with and advised with the attorneys of the shippers, especially Mr. Thorne, and they two acted together?

Mr. HARLAN. If you mean by that that he did not also confer with counsel for the railroad companies, I do not think it is accurate. I do think that counsel for the shippers relied a good deal upon Mr. Brandeis in helping in the presentation of that side of the case, and that brought him more largely into contact with them than into contact with anyone else.

Senator WORKS. If it had not been for the fact that you felt that the shippers would need additional help in order to present their case properly, Mr. Brandeis would not have been employed, would he?

Mr. HARLAN. Senator, I do not think it is quite accurate to say that Mr. Brandeis was employed in the interest of the shippers. As that letter indicates, we felt that upon us would be the duty of passing upon what probably was the largest question in dollars and cents that any tribunal had ever been called upon to deal with, and we felt that we ought to have a complete and a full record; that we ought not to be content with a record made up by skilled and well prepared railroad attorneys and experts, and that we ought not to be content with a record that was deficient because of lack of sufficient care and preparation in bringing out the other side of the case. We wished a full record and a complete record. We did not rely upon counsel for the carriers upon the one hand, and we did not rely upon counsel for the shippers upon the other hand; but in the public interest we retained a skilled attorney of our own.

Senator WORKS. You have not quite answered my question, Mr. Harlan. I will ask the stenographer to read the question.

(The reporter repeated the question, as follows:)

Senator WORKS. If it had not been for the fact that you felt that the shippers would need additional help in order to present their case properly, Mr. Brandeis would not have been employed, would he?

Mr. HARLAN. Senator, I believe that if there had been no shippers at all in that case, and no attorneys repressing the shippers, we would have felt the need of Mr. Brandeis more than we did. By that I mean we would then have had a record made up by the railroads alone, and under our responsibility we would have felt the need of a broader record than they might have been ready to present to us.

Senator WORKS. Do you think you have answered my question yet?

Mr. HARLAN. Perhaps I am a little slow in apprehending it, but I thought I had answered it.

Senator WORKS. Of course, you must be the judge about that, Mr. Harlan. What did you mean, then, by this first clause; that is, the first clause that is printed here on page 8 of the record, in which you say:

We are, of course, aware of the fact that the carriers will not fail fully to present their side of the case, and the commission has felt that every effort should be made in the public interest adequately to present the other side.

Is it not a fact that that was the thing you wanted to do; that is, to present adequately the other side as against the carriers?

Mr. HARLAN. Yes.

Senator WORKS. Yes?

Mr. HARLAN. I would not say "against the carriers."

Senator WORKS. That may not be quite proper. And, of course, in connection with that, taking the subsequent clause that you have already explained, you desired that the facts should all be brought out?

Mr. HARLAN. Yes.

Senator WORKS. But the real object and incentive for employing Mr. Brandeis was that the public interest should be protected by bringing out the shippers' side of the controversy, was it not?

Mr. HARLAN. Well, the "public interest" is a little broader than the mere shipping side.

Senator WORKS. Certainly.

Mr. HARLAN. Yes.

Senator WORKS. But in that particular instance the shippers were representing the public interest, were they not?

Mr. HARLAN. I shall have to let you judge of that. A shipper usually comes before us with a very special interest of his own.

Senator WORKS. Undoubtedly so; but the controversy here was a good deal broader than that?

Mr. HARLAN. That is the point I wish to make.

Senator WORKS. Yes.

Mr. HARLAN. You may recall, Senator, that before the proceeding was started, and during it and after it, there was a good deal of comment in the public press and elsewhere about the credit of railroads and how important it was that their credit should not be impaired, so that capital might be had for modern equipment and for keeping up the service at a high standard of efficiency and for further extensions into territories that are not occupied by railroads. In presenting

their case this was emphasized by the carriers. The development of the country was one of the important matters that was urged upon our attention by the carriers, together with the necessity of adequate revenues, so that the credit of the carriers would be good enough to enable them to get further capital for all these purposes. In all this there is a very large public interest, and that illustrates what I meant there when I referred to the public interest in my letter to Mr. Brandeis.

Senator WORKS. I think that is all I want to ask.

Senator WALSH. Mr. Harlan, I want to ask you a question or two. I should like to inquire of you whether it had ever occurred to you or to any of the members of the commission, so far as you are permitted to speak for them, that Mr. Brandeis had been faithless to the commission or to the public in the discharge of the duties which he undertook?

Mr. HARLAN. Senator, I feel assured that I represent the views of my colleagues when I say that no such thought ever occurred to any of us. So far as I am concerned, personally, if I may express a personal view, I can not associate such an idea with Mr. Brandeis. It is not consistent with my view of him or with the impressions that I have formed from a long acquaintance with him.

Senator WALSH. Doubtless you know, Mr. Commissioner, the nature of the complaint made in this connection. It appears to be that, the questions involved being, first, whether the net revenues of the railroads as a whole, without any economies or change of business methods, were adequate, and second, if they were not, by what means they should be made adequate, Mr. Brandeis, in opening the discussion before the commission, made the statement in fact that in his opinion the revenues of the railroad companies were not on the whole adequate, considering the needs of the railroads and the general welfare of the community. Do you recall the statement to which I allude?

Mr. HARLAN. Yes; I do, Senator.

Senator WALSH. In a general way at least?

Mr. HARLAN. Yes; I do.

Senator WALSH. What was your view as to the propriety or the impropriety of Mr. Brandeis expressing any such opinion as that to you in the course of his discussion of the matter, as he had investigated it?

Mr. HARLAN. It never occurred to me that there was any impropriety in it. On the contrary, as I view the situation, it was precisely the sort of view that we looked to counsel to express as the result of his study of the case and the record as it lay before us. I do not mean, in saying that, that we had expected him to reach that conclusion on the record before us; I mean to say that it was that sort of judgment that we wanted from all the counsel discussing that case, and particularly from Mr. Brandeis. He had, of course, been in the case from the beginning. We wanted him to develop the facts, all the facts, that might bear upon the public interest, and I know of no more important fact in such a case than precisely that question. If the revenues of the carriers, the net incomes of the carriers, were not sufficient that was something that we ought to know. It was one of the questions that the commission undertook to investigate.



out all the facts of value, as I have explained, I do not see how he could have failed, when discussing the record, to advise us of any conclusion he had reached from his study of the testimony and evidence adduced, and to point out from the record, as he did, the reasons for that conclusion. We were entitled to have the views of those who had studied the record. As far as I know, the impropriety of the statement by him, to which you refer, has never occurred to any of my colleagues. But in saying that and in what I have said, or shall say I speak only for myself.

Senator WALSH. That is all.

Senator WORKS. Mr. Harlan, that admission, if we call it an admission, practically covered the whole case, did it not?

Mr. HARLAN. Why, no, Senator.

Senator WORKS. The very question you had before you was whether these rates should be increased as asked for by the carriers, was it not?

Mr. HARLAN. Well, whether the net revenues were adequate in the public interest was a very different question from the reasonableness of the rates which were then in existence, or the rates which were proposed by the carriers.

Senator WORKS. That was his admission, was it not? That was the very thing that he admitted?

Mr. HARLAN. I think that covers the drift of your question.

Senator WORKS. I hope I am making myself understood.

Mr. HARLAN. It was a very important phase of the case.

Senator WALSH. Permit me to remark that that was not Senator Works's question, as to whether it was an important feature. Undoubtedly it was. The question addressed to you by Senator Works was whether that was not the question in the case?

Senator BORAH. No; that was not it.

Senator WALSH. And the whole question.

Senator BORAH. I think, perhaps, the commissioner will understand Judge Works.

Mr. HARLAN. It was only one question in the case.

Senator WORKS. What were the other questions?

Mr. HARLAN. The other question was whether the rates that were proposed were reasonable rates for the service and whether the existing rates were unreasonably low; in other words, whether the carriers could, without impairing the interests of the shippers, increase those rates?

Senator WORKS. Do you remember just what you stated were the issues that were to be argued?

Mr. HARLAN. I should say just about as I have stated them now.

Senator WORKS. They are stated in the record.

Mr. HARLAN. Do you mean in the report, Senator?

Senator WORKS. They are stated in the record somewhere.

Senator WALSH. I have it here, Senator.

Senator WORKS. What is the page?

Senator WALSH. It is on page 63 of volume 2, in the views of Senator Cummins. Senator Cummins says: "The chairman of the commission, after some preliminary statements, said," and then he quotes from page 12 of the record.

Senator WORKS. You have the report, there?

Senator WALSH. Yes, sir; Senator Cummins's report. It is right at the bottom of page 63.

Senator WORKS (reading):

There are, therefore, two proceedings which, however, the commission has consolidated upon the record. Growing out of the two proceedings were certain hearings respecting rates on certain commodities, and protests having been made by shippers interested in those particular rates, those hearings were conducted independently, but they are also a part of this proceeding now before us.

The rest of the case has followed the two branches of inquiry propounded by the commission in its first order of investigation, namely:

Do the present rates of transportation yield an adequate return to common carriers, the railroads operating in official classification territory?

It was broadly admitted by Mr. Brandeis, was it not, that they did not bring an adequate return to the common carriers?

Mr. HARLAN. Yes, sir.

Senator WORKS. Then the second one is:

Second. If not, what general course may the carriers pursue to meet that situation?

Mr. HARLAN. Yes.

Senator WORKS. Those were the two propositions that were submitted?

Mr. HARLAN. Yes.

Senator WORKS. That is what I wanted to call to your attention.

Mr. HARLAN. Yes.

Senator WORKS. The second one of them was not necessary to enter upon at all if the rates were adequate and returned an adequate revenue.

Mr. HARLAN. If those two are to be regarded as comprehending the whole case and as limiting our duty in the case, your suggestion is entirely right.

Senator WORKS. Mr. Harlan, I am taking the statement made at the time when you were attempting to determine what the argument should be and when it should take place, and those two propositions are stated as the ones to be argued.

Mr. HARLAN. Yes; I remember those two.

Senator WORKS. The second one of them is secondary to the first, and that was the main issue to be determined, whether the rates did return an adequate revenue. There is no question about that, is there?

Mr. HARLAN. Yes; I think that is true. Of course, we had the rates before us and these rates we had to pass upon. That is the way the commission, so far as I acted for the commission, lined up the course of the discussion, just as you have it.

Senator WORKS. That was the very ultimate question that the commission had to determine, was it not, as to whether or not the rates did return an adequate revenue?

Mr. HARLAN. Technically, no, Senator. If you will read the dissent of one of my colleagues you will see what I mean. We had there a schedule of increased rates. They had to be disposed of. They had to be disposed of on this record. But, as you indicate, what we asked to be argued before the commission were those two questions.

Senator WORKS. And, laying aside these other matters you mentioned, that was the matter the commission had to determine at last?

Mr. HARLAN. Those were the matters we set for ourselves to determine.

Senator WORKS. Then, Mr. Brandeis having been employed by the commission to represent especially, as indicated by your letter, the interests of the shippers, after the argument—

Mr. HARLAN. I can not agree to that question, Senator.

Senator WORKS. Very well; I will put it and you can disagree to it, but I am taking your letter as the basis of the question. You are under no obligation to agree to it, of course. But taking that to be so, then Mr. Brandeis was admitting away that side of the case, in broad terms, was he not?

Mr. HARLAN. I should not put that construction upon it. You must not overlook the fact, Senator, that while the commission found in its first report that the revenues of the carriers were inadequate, in the public interest, we did not decide the case against the "other side," to which you have referred. On the contrary, we denied the advance in rates that the carriers had demanded and pointed out other sources for securing the needed revenues. In the first report we permitted a rate advance only in central freight association territory, and in doing so we not only referred to the unfavorable financial condition of many of the lines operating in that territory, but pointed out that their rate structure was lower than any similar rate structure in the country. In saying what he did, I should say that Mr. Brandeis was giving the commission the benefit of his view of the record as made. But the commission did not act upon Mr. Brandeis's view, as expressed on that occasion. We acted upon the record and found, upon the testimony and evidence adduced, that there was an inadequacy of revenues.

Senator WORKS. That is quite immaterial as determining the justice or injustice of Mr. Brandeis's course in the matter. Do you think it was quite fair, if it is true that Mr. Brandeis had been acting throughout these proceedings with Mr. Thorne, that he should insist upon making the final argument at the close of the case, and then make this admission?

Mr. HARLAN. Your question presumes certain things as to which I have no information, and I would prefer not to make any expression in response to it. What Mr. Brandeis and Mr. Thorne talked of, I do not know.

Senator WORKS. You have given your opinion about the course of his conduct and what you thought about it. Assuming that to be so, do you consider that to be fair?

(The question was repeated by the stenographer.)

Mr. HARLAN. I do not believe that I am prepared to make any response to that question. I will say that as far as my experience goes with Mr. Brandeis he is a man who showed at all times great consideration for others. I do not believe that Mr. Brandeis would consciously have done an unfair thing. I am perfectly certain that in saying what he did he was moved by a sense of duty, upon the record, to the commission. No other thought about it has ever occurred to me, and I never have heard any of my colleagues indicate any criticism of it, or that they were surprised by it. Now, that may not be responsive to your question.

Senator WORKS. No; it is not quite.

Mr. HARLAN. But it is the only reply I can make.

Senator WORKS. It is an argument instead of an answer; but we lawyers are accustomed to that.

Have you discussed this matter with your associates since his conduct in that respect was brought in question?

Mr. HARLAN. Since——

Senator WORKS. Since these hearings?

Mr. HARLAN. No; I do not recall that it has been a matter of comment among us at all.

Senator WORKS. It never was brought to your attention and suggested that there was any impropriety in that course?

Mr. HARLAN. I do not think it was.

Senator WORKS. No?

Mr. HARLAN. Until I saw suggestions in the public press. Well, now, that is not quite accurate. Mr. Thorne, I think, at the time, or if not, shortly afterwards, publicly expressed his disapproval. My recollection is that right then and there Mr. Thorne did make a protest, but so far as my colleagues are concerned I do not recall that that question has ever been a matter of comment.

Senator WORKS. If you could eliminate your estimate of Mr. Brandeis from your consideration of this question, would you think that a fair thing to do, or do you care to answer that question?

Mr. HARLAN. I want to be as helpful as I can.

Senator WORKS. Oh, I understand that.

Mr. HARLAN. If Mr. Brandeis had nothing but a sense of duty to Mr. Thorne, growing out of his conferences with Mr. Thorne, and he looked upon Mr. Thorne as dominating the case, and Mr. Thorne's clients as being the dominating interests on one side of the case, there might have been some unfairness in it; but having, as I assume he had, a sense of duty to himself and to the commission, and particularly, in the larger view, to the public, it has not occurred to me that he could do anything short of making a frank expression of his best judgment on the record.

Senator WORKS. Suppose that to be taken as true, now, do you not think it would have been a fair thing for him to let Mr. Thorne, with whom he had been working throughout this case, know so that he might have an opportunity to meet that admission in argument?

Mr. HARLAN. Well, Senator, that question I can not answer. I do not know what had been their intercourse with one another in the case. Mr. Brandeis never talked with me about it, and, in fact, I do not think I have seen him since that case was finished.

Senator WORKS. Did you consult with Mr. Brandeis along during these proceedings, at different times?

Mr. HARLAN. Oh, yes; very frequently; very frequently.

Senator BORAH. Mr. Harlan, I have never had any practice before the Interstate Commerce Commission and it may be possible that I do not understand the practice there, but it is difficult for me to find out just what position Mr. Brandeis occupied with relation to the commission. It has seemed to me sometimes that he was the tenth member of the commission—that is, speaking respectfully.

Mr. HARLAN. Yes.

Senator BORAH. That he was there as a common counsel and a common adviser with the commission. But I wanted to get the matter clear. You letter says here:

We are, of course, aware of the fact that the carriers will not fail fully to present their side of the case.

Your letter recognizes there that their side is contradistinguished from another side.

Mr. HARLAN. Well, yes; you can put that view upon the letter.

Senator BORAH. Of course it might not be the view of the commission, but it would be under the limits. You continue:

We are, of course, aware of the fact that the carriers will not fail fully to present their side of the case and the commission has felt that every effort should be made in the public interest adequately to present the other side.

Now, what was the other side?

Mr. HARLAN. What the letter means, Senator, is that the carriers knew what they wanted and had been preparing to tell us in their own way what they wanted, and to give us all the material available to them in support of what they wanted, which was an increase in rates. The other side was whether the revenues should be increased, whether the present rates were unduly low, whether the proposed rates were unduly high; and ranged on that side, of course, is the broad public interest to which I have alluded, and the specific interest of shippers who have to use the rates.

Senator BORAH. When you asked Mr. Brandeis to appear for "the other side" you had reference to the side which was contradistinguished from the carriers' side, whatever it was?

Mr. HARLAN. Yes; you can put it that way, if you like.

Senator BORAH. Well, truly, I can not see any way to present it but that, and if there is any other way I would be glad to have you state it, because it has been a matter of some difficulty with me.

Mr. HARLAN. I do not know that I can state it in any better form than I have endeavored to—that it was our duty to see all sides of a case. We have often said that; it was the general public interest—

Senator BORAH. That is what I am trying to get at.

Mr. HARLAN. We have said that a rate is equivalent to a statute. It is a public question.

Senator BORAH. Yes.

Mr. HARLAN. When you pass a statute you want to know all sides of the question involved in the statute.

Senator BORAH. Yes.

Mr. HARLAN. You take testimony and have hearings. So we also hear all sides of this public question before making up our minds what we are going to do. That is what the letter means.

Senator BORAH. That is what you say you, as commissioners, were going to do. Then it must follow from your letter, I take it, that you really regarded Mr. Brandeis as largely in the same attitude toward the whole subject matter as you commissioners.

Mr. HARLAN. No; I do not mean that.

Senator BORAH. Well, he must either have represented no side, and therefore have been largely in the attitude of the commission, or he must have represented one or the other of the sides.

Mr. HARLAN. It may seem so to you. It does not seem so to me. What we wanted was experienced counsel to get up the whole case, both sides, and I thought the letter expressed that.

Senator BORAH. This is what the letter says:

We are, of course, aware of the fact that the carriers will not fail fully to present their side of the case, and the commission has felt that every effort should be made in the public interest adequately to present the other side. Would you care to undertake that burden?

What burden? The burden of the other side. It must necessarily be so.

Mr. HARLAN. Will you go ahead a little beyond that, Senator?

Senator BORAH. I did not take it that the balance of the letter had much to do with it in view of that explanation. At one time I thought it did; but you have said that this question of not advocating any particular theory had reference to—

Mr. HARLAN. With reference to a special matter.

Senator BORAH. Yes. Here is what follows in the letter:

As you are already aware, in a number of cases of large importance and wide interest special counsel have been retained by the commission. As a matter of fact that has not been their real relation in these controversies. They have been retained by the commission, not as advocates or to support any special theory of the issues involved, but as a means by which the commission might be advised of all the facts and not have to decide the issue upon a record made up largely in one interest.

Mr. HARLAN. Yes.

Senator BORAH. You add: "It is with this general thought in mind that the commission has reached the conclusion," etc.

When you came to the argument, as I have looked over hurriedly the arguments of counsel for the railroad companies, it seems they all argued that these rates were inadequate, and when Mr. Brandeis arose to make the argument he made the admission to the effect to which they had made their arguments that the rates were inadequate.

Mr. HARLAN. Well, he said that the revenues were inadequate.

Senator BORAH. That was their contention. I find that in one of the briefs the language is almost identical.

Senator FLETCHER. I think there is quite a difference between the proposition whether the rates are adequate or whether the net income is adequate.

Senator BORAH. I understand that; I have some comprehension of that fact also. But looking over the briefs of counsel I found in one of them, if correctly reported, that the argument of the counsel for the railroad companies was along the same line and almost identical with the argument made by Mr. Brandeis.

Now, then, do you, in the interpretation of your letter, understand that Mr. Brandeis was in a position to take the same view of the matter as the railroad companies or in the presentation of it to you people? Would he be fulfilling his duty, in representing the other side, to admit what they contended for?

Mr. HARLAN. Why, Senator, not as you put that question; but I do think that Mr. Brandeis was under the duty to himself and to the commission to tell us what he thought of that whole record; not as your question seemed to imply, because the railroads thought the same.

Senator BORAH. No, no; not because—the way your letter reads there—let me distinguish. You felt that he felt it was his duty to say something that was different from the railroads' point of view.

Mr. HARLAN. Just the way you—

Senator BORAH. You employed him to represent the other side from the railroads.

Mr. HARLAN. Oh, no, no.

Senator BORAH. Then your letter does not convey to me anything at all, Mr. Harlan.

Mr. HARLAN. The letter ought to be clear.

Senator BORAH. The fault may be in the letter and not in Mr. Brandeis.

Mr. HARLAN. Certainly; it may be my fault.

Senator BORAH. But the letter recognizes here two sides of the controversy, the carriers' side and "the other side"; and "the other side" is the burden which you say you want Mr. Brandeis to undertake to carry.

Mr. HARLAN. Yes. But for what purpose? The letter goes on to explain, speaking of these attorneys employed by the commission, that they "have been retained by the commission not as advocates or to support any special theory of the issues involved, but as a means by which the commission might be advised of all the facts and not have to decide the issue upon a record made up largely in one interest."

Senator BORAH. That might have to do with the issue; but when Mr. Brandeis arose to argue the case the record was before you.

Mr. HARLAN. No, Senator, that has not to do with the record. The letter expressly points out the reason for retaining attorneys. They have been retained in order that we may have a full record, and not have to decide the issues on a one-sided record.

Senator BORAH. Let us see what it says. The letter says:

They have been retained by the commission, not as advocates or to support any special theory of the issues involved—

Mr. Brandeis did advocate and support a certain theory of the issues involved. He advocated the proposition, in a most powerful way, that the rates were insufficient.

Mr. HARLAN. That was not a theory. That was a fact, as he found it on the record. The case was not developed along a theory. That was his statement of the fact as the weight of the evidence seems to him to indicate—a conclusion which the evidence seemed to him to require.

Senator WORKS. That is the objection to it. Of course it was his duty to disclose the facts, under your letter. It says so.

Mr. HARLAN. It should have indicated that, perhaps.

Senator BORAH. Then it seems, in your view of the matter, under your letter Mr. Brandeis should have occupied the same attitude of mind toward the controversy that the commission did, to investigate the entire matter, and if he felt that the railroads were entirely correct, to say so.

Mr. HARLAN. I think that expresses it. What we wanted was a man of experience who could take up a great question of that kind and develop all the facts and give us a complete record; not a record based upon a theory such as I have referred to, but a record that would give us all the pertinent facts bearing on the controversy, and then present it to the commission, telling us what impressions he had from the whole record after he had carefully weighed the evidence.

Senator BORAH. Then he was practically, for that case, a tenth member of the commission?

Mr. HARLAN. Would it not be better, Senator, and more fair to the commission to say that he was counsel in the public interest? That is the way it looks to me.

Senator BORAH. To do that, Mr. Harlan, you have got to separate the railroad companies, eliminate them from being a part of the

public interest, because your letter treats them as one side and the public interest as the other side, here.

Mr. HARLAN. Well, I do not know that I can make any response to that suggestion, Senator. The letter read, as a letter, seems to me to explain just what I have said, that what the commission felt the need of was a man who was experienced and who would undertake to give us a full record.

Senator WORKS. Let me ask you, Mr. Harlan, if the employment was such as you indicate, or such as you intended, do you not think your letter was calculated to mislead the representatives of the shippers? They would very naturally say that Mr. Brandeis was to act with them in bringing out their side of the case, would they not? They would have a right to do that?

Mr. HARLAN. Senator, I do not know. It does not seem so to me. As I see the letter now, it is perfectly clear. I do not see how it could have been misunderstood by any shipper or any attorney for a shipper who has practised before the commission. This was not a new thing. In other important cases we have had an outside attorney in precisely this capacity, representing the public interest. We did in the two preceding cases, and in a number of cases we have had them.

Senator WORKS. I believe it was testified at this hearing with respect to this particular case, by one of those attorneys that you had previously employed, that he never assumed to give any such advice or opinion respecting such a matter as this, but simply developed the facts.

(At this point, at 3.55 o'clock, Mr. Borah retired from the hearing room, there remaining Senators Chilton (chairman), Fletcher, Walsh, and Works—a quorum.)

Mr. HARLAN. I do not know who that was; but my own recollection is, and my understanding is, that we expect those who are retained by the commission for this purpose to be of aid to the commission, not only in developing the facts, but after weighing the record in pointing to the conclusions that the record seems to justify; and, as I have said before, I say again, that I heard no comment or criticism in the commission of Mr. Brandeis's course upon the argument.

Senator WORKS. As I understand you, it has never been discussed at all?

Mr. HARLAN. No. It may have been with others. I have never heard it discussed.

Senator FLETCHER. I want to ask you a question. These hearings and investigations extended over a long period of time, several months?

Mr. HARLAN. Seven or eight months; yes.

Senator FLETCHER. At the conclusion was there any claim or suggestion by any shipper or any one interested, any person, to the commission, that Mr. Brandeis had failed or neglected to present adequately their side of the case?

Mr. HARLAN. Aside from the comment of Mr. Thorne, I know of no such criticism.

Senator FLETCHER. Yes.

Mr. HARLAN. Let me add that on the contrary there were many shippers there who looked to Mr. Brandeis to present certain testi-



mony that they were ready to offer, and he did present it, and spread it very fully on the record.

Senator FLETCHER. I understand that there was in your mind in writing the letter that presenting the other side meant in the argument of this case and when the facts were collected?

Mr. HARLAN. When the broad record was made.

Senator FLETCHER. As you expressed it further down in the letter: "And I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record," etc. Was there any claim or suggestion that he failed or neglected to do that?

Mr. HARLAN. I have heard none at all.

Senator FLETCHER. Even Mr. Thorne, in complaining about the statement made by Mr. Brandeis, never contended that Mr Brandeis had failed in the effort to collect all the facts in the case?

Mr. HARLAN. I do not recall that he made that criticism, Senator.

Senator FLETCHER. Then, when you announced one issue in the language mentioned, "Do the present rates of transportation yield an adequate return to common carriers?" Is not that a different question than whether or not the net income of the railroads—the net operating revenues of the railroads—are sufficient?

Mr. HARLAN. I regard it, of course, as a very different question.

Senator FLETCHER. Yes.

Mr. HARLAN. I mean there is a very distinct difference between the two questions.

Senator FLETCHER. A very distinct difference?

Mr. HARLAN. Yes.

Senator FLETCHER. So that when an admission is made that the net operating revenues of a railroad company are insufficient, or the net income is insufficient as the road is being operated, it is not an admission that the rates are inadequate?

Mr. HARLAN. No; by no means. The adequacy of net operating revenues brings up questions of credit, adequate facilities, efficient service, extension of tracks, and matters of that kind. Whether the rates are adequate brings into view their reasonableness and related questions. As I have before pointed out, the commission held in the first report in the Five Per Cent case that the net operating revenues of the carriers were inadequate in the public interest, but at the same time we denied the increased rates demanded by the carriers and permitted an increase in central freight association territory only in connection with a finding that those rates were unduly low when compared with rate structures elsewhere in the country.

Senator CHILTON. It therefore follows that Mr. Brandeis's admission did not answer and conclude the first proposition that you presented?

Mr. HARLAN. Well, it certainly did not conclude it with the commission.

Senator FLETCHER. And no matter what Mr. Brandeis or any of the counsel may have stated in argument the commission itself had the whole record before it and all the facts were collected, and there has been no claim that any shipper or any other interest was omitted in the collection of the facts?

MR. HARLAN. No; I have heard no criticism of that kind, and I do not think there is any basis for such criticism. I want to say also that I do not think the commission ever dealt with any case that engaged the personal attention of each commissioner more deeply and for a greater length of time than did the Five Per Cent case.

Senator WORKS. If that is all, Mr. Chairman, I have an engagement at 4 o'clock.

Senator CHILTON. Does any other Senator want to ask Commissioner Harlan anything?

(The witness was excused.)

Is there any further evidence on these matters now, Senator Works, that you have to offer?

Senator WORKS. No. It was not my evidence.

Senator CHILTON. Do you know about Senator Sutherland?

Senator WORKS. No. I think the testimony this forenoon covered what the Senator asked for.

Senator CHILTON. Have you anything else?

Senator WORKS. No; I have nothing.

Senator CHILTON. Then there is no reason why it should not be closed up now and be printed and go back?

Senator WORKS. No.

(Thereupon, at 4.02 o'clock p. m., the subcommittee adjourned. There were present on adjourning Senators Chilton (chairman), Fletcher, Walsh, and Works—a quorum.)

## NOMINATION OF LOUIS D. BRANDEIS.

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JUNE 1, 1916.—Ordered to be printed and injunction of secrecy removed.

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Mr. CHILTON, from the Committee on the Judiciary, submitted the following

### REPORT.

[To accompany the nomination of Louis D. Brandeis.]

The Committee on the Judiciary, to whom was referred the nomination of Louis D. Brandeis, of Massachusetts, to be associate justice of the Supreme Court of the United States, vice Joseph Rucker Lamar, deceased, beg leave to report it back with the recommendation that it be confirmed.

The nomination was referred to the Committee on the Judiciary on January 28, 1916. On January 31 the committee referred it to the following as a subcommittee: Messrs. Chilton (chairman), Fletcher, Walsh, Clark of Wyoming, and Cummins.

The subcommittee held hearings, made necessary by a protest against confirmation of the nomination, which began on February 9, 1916, and continued from time to time until March 15, 1916. On February 16 Mr. Works was appointed on the subcommittee in the place of Mr. Clark of Wyoming.

On April 3 the subcommittee made a favorable report to the entire committee, recommending confirmation of the nomination. There was a minority report, however, against confirmation, made by Messrs. Cummins and Works. The majority views of the subcommittee are set out at length in the separate reports of the majority members of the subcommittee. Mr. Chilton's views were concurred in by Mr. Fletcher, and Mr. Walsh filed a separate report.

All of these views of the members of the subcommittee are printed in Senate Document No. 409, Sixty-fourth Congress, first session, and your committee herewith adopts the statements and views of Mr. Chilton and of Mr. Walsh and makes the same a part of this report, as follows:

## NOMINATION OF LOUIS D. BRANDEIS.

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MR CHILTON, from the subcommittee of the Committee on the Judiciary, submitted the following

### VIEWS.

[To accompany the nomination of Louis D. Brandeis.]

To the COMMITTEE ON THE JUDICIARY,  
*United States Senate:*

As heretofore announced to the Committee on the Judiciary, your subcommittee decided to have open hearings, which were begun on February 9, 1916, and continued from time to time until March 15, 1916.

Very soon after your subcommittee was organized a protest against the confirmation was filed, signed by the following-named gentlemen:

Charles S. Rackemann.	Reginald H. Johnson.	Louis Bacon.
Harrison M. Davis.	Henry Ware.	Lawrence P. Dodge.
Joseph Sargent.	J. L. Thorndike.	George B. Harris.
A. Lawrence Lowell.	Julian Codman.	Eugene J. Fabens.
John Noble.	Richard C. Storey.	Charles H. Fiske, jr.
Charles F. Adams.	Fred C. Bowditch.	Harold Jefferson Coolidge.
I. Tucker Burr.	W. L. Putnam.	P. T. Jackson, jr.
C. Minot Weld.	Edward H. Warren (Prof.).	Augustus P. Loring.
Nathaniel H. Stone.	Roger S. Warner.	William W. Vaughn.
Felix Rackemann.	James M. Newell.	Samuel D. Parker.
Arthur Lyman.	William S. Hall.	Thomas N. Perkins.
Henry S. Grew.	Clifton L. Bremer.	R. W. Boyden.
George P. Gardner.	Lawrence Minot.	Henry L. Shattuck.
Roger Walcott.	Henry E. Edes.	A. R. Graustein.
Pierpont L. Stackpole.	Hollis R. Bailey.	James D. Colt.
Francis Peabody.	Edward S. Dodge.	Edmund A. Whitman.
Edmund K. Arnold.	F. Walker Johnson.	William C. Indicott.
Willard B. Luther.	George B. Dabney.	Albert E. Pillsbury.
Charles A. Williams.	Francis R. Boyd.	William V. Kellen.
Moses Williams.	J. A. Lowell Blake.	Frederic M. Stone.

Mr. Austen G. Fox, assisted by Mr. Kenneth M. Spence, appeared on behalf of those signing the petition, and the committee requested Mr. George W. Anderson to represent the committee in bringing out the facts. Quite a number of other protests and many letters of commendation of the nominee were filed before the committee in the shape of letters and telegrams, some to the committee and some to different members, all of which are made a part of the report.

As to every charge made against the nominee, by the protesting committee or contained in rumor or which in any way came to the knowledge of your committee, we have sent for those alleged to have knowledge and have examined such witnesses. All the testimony of the 43 witnesses examined was taken down by a stenographer, was printed, and is contained in one volume of 1,316 pages, which is now before the Committee. The evidence relates to various charges reflecting upon the professional conduct of the nominee, as well as his standing and general reputation.

On pages 884 to 887, 933 and 934, and 1225 and 1226 may be found a summary of the matters as to which the proof, outside of opinion evidence, relates. These charges will now be taken up, one at a time, and the proof relating thereto analyzed.

#### WARREN CASE.

It is charged that Mr. Brandeis consciously advised and assisted Samuel D. Warren in a breach of trust in fraud of his brother, Edward P. Warren. This charge is wholly unfounded, and was recognized to be by the leading counsel for Edward P. Warren in the suit concerning this trust (284, 860, 1164). The propriety of Mr. Brandeis's conduct in this case was also recognized by one of his leading opponents who was counsel for other beneficiaries of the trust (278). In May, 1888, Samuel D. Warren and Mr. Brandeis were partners in the practice of law and had been for about 10 years. In May, 1888, Mr. Warren's father, Samuel D. Warren the elder, died, leaving a widow and five children, entitled under his will to his property in their own right without the intervention of any trustees—the widow to five-fifteenths and each child to two-fifteenths.

Mr. Warren the elder owned paper mills in Maine, valued at nearly \$2,000,000. These paper mills were conducted by the firm S. D. Warren & Co., composed of himself and Mortimer B. Mason, who had been with him for 18 years and a partner for 6 years. One son, Fiske Warren, was employed in the business and had been for about five years. Warren & Brandeis had been attorneys for S. D. Warren & Co. before the elder Warren's death, and were counsel for the executors of his will. They had no other connection or relation with Edward P. Warren, a son then 29 years of age. The Warren family was believed to be entirely harmonious at this time, and to desire to keep the mills intact as a family property. There was no member of the family fitted by temperament or desire to take the active headship of the business except Samuel D. Warren. They all lived in or near Boston except Edward P. Warren, who was in England. Mr. Mason was regarded by all as essential to the business because of his experience and ability. He was receiving one-sixth of the profits of operation of the mills, and believed that he should receive under the changed condition one-fourth of the profit. He had earned in the last two years \$76,000 and \$68,000, respectively, as his share of the profits. This is a larger amount than he averaged during the ensuing 20 years under the plan that was adopted. This plan was to have the real estate vested in trustees who should lease to an operating concern which should pay a fixed rental of 6 per cent and an additional amount equal to one-half the profits of the operating concern. The

trustees selected were Samuel D. Warren and Mr. Mason and Mrs. Warren, the widow. The operating concern was a new partnership of Samuel D. Warren & Co., composed of Mr. Mason, with one-half interest; Samuel D. Warren, with one-third interest; and Fiske Warren, with one-sixth interest. The plan was elaborately discussed (842, 858) among the members of the family, all of whom were persons of intelligence, and was agreed to before the trust was created. The papers to give legal effect to the plan were drawn and executed the end of May, 1889, and sent to Edward P. Warren in a letter explaining these terms (844). He executed them, and the business was carried on in accordance with this arrangement for a period of over 20 years.

Full accounts were rendered annually, and they show the profits resulting to the partnership from operating the mills under this lease and the income resulting to the trust (858, 519-607).

Mr. Warren retired from the practice of law and from the firm of Warren & Brandeis in 1889. Mr. Brandeis and his firm continued to be the legal adviser of the firm of Samuel D. Warren & Co. and of the trustees throughout the ensuing 20 years. They also advised and acted for the various members of the family from time to time, and it was well known to all that they were so acting. No dissension arose until after the death of Mrs. Warren in 1901. This left a vacancy in the board of trustees. Henry Warren, next in age to Samuel D. Warren, had died. The declaration of trust provided for the appointment of a trustee, preferably from among the children of the elder Warren, and not a member of the firm. This limited the preference to Edward P. Warren or his sister, Cornelia Warren. Mr. Mason and Mr. Samuel D. Warren believed that Edward P. Warren, on account of his temperament and the fact that he was living in England, was not a desirable trustee; and it was proposed immediately after the mother's death that Cornelia Warren be appointed a trustee, but Edward P. Warren opposed this. The next year it was proposed that Fiske Warren be appointed. This was also opposed by Edward P. Warren. Fiske Warren had retired to a considerable extent from active business, and his proportion of the profits had been reduced from 16½ per cent to 5 per cent, and soon thereafter to 2½ per cent.

In 1903 Edward P. Warren retained William S. Youngman, who has testified in the present hearing (461-518, 1286-1296, 1306-1307). He soon after began investigations and in 1906 rendered an elaborate report to Edward P. Warren thereon (861), approving the details of the accounts, but claiming that the plan had worked too much to the advantage of Samuel D. Warren & Co., that too much of the income of the trust had been devoted to the improvement of the properties instead of to the payment of the beneficiaries, and commenting on the division between the repair account, which was a charge of operations, and the improvement account, which was a capital charge against the trust.

The trust instrument originally provided that the trustees might retain one-third of the net income for improvements. This was found to be inadequate, and by informal agreement reached in 1890, the amount was increased to one-half. All the beneficiaries had agreed to this. The fact was recited in the reports from year to year.

The profits which the partners had received from the operation of the mill had not exceeded, on the average, those to be expected from the condition of the business as it had been estimated in 1889 in the estimates submitted to the beneficiaries before the plan was agreed to (842).

The division between repairs and improvements had been fairly and honestly made (862).

After 1906, negotiations continued relative to the appointment of a new trustee, but no satisfactory agreement could be reached. Edward P. Warren, after having urged his own appointment, urged the appointment of Mr. Youngman. Outsiders also were suggested.

At the end of 1909 suit was brought by Edward P. Warren against Samuel D. Warren, seeking an accounting and the removal of Samuel D. Warren as a trustee (894-933). Cornelia Warren, whose interests were the same as Edward P. Warren's, and Fiske Warren, whose interests were nearly the same, opposed the suit, as did their counsel (915). Brandeis, Dunbar & Nutter acted for Samuel D. Warren, and one of the members of the firm tried the case up to the death of Samuel D. Warren, who was the first witness. Nothing developed to the discredit of Mr. Warren or Mr. Brandeis in any way, and any lack of good faith on their part was disclaimed in the suit itself by counsel for Edward P. Warren (277, 284, 860, 1164). Some months after the death of Mr. Warren the others in interest bought out the share of Edward P. Warren in the estate at what was believed by them to be no more than the share was worth, making no allowance for any claims made in the suit (278, 867).

Samuel D. Warren was a man of high character and intelligence. The drafts of the original papers for the formation of the trust and the lease were in his handwriting (841). Mr. Brandeis advised about the matter and took part in the conveyances which were made. The negotiations between the different members of the family were conducted directly between them. Apparently all communications with Edward P. Warren were from Samuel D. Warren or other members of the family. No occasion arose for the intervention of counsel between the different members of the family at the time the trust was created or at any time up to the time that Mr. Youngman was employed by Edward P. Warren. The original agreement was a fair one (277, 278) and worked out fairly and was justly and honestly administered, and the share of Edward P. Warren increased enormously under the administration of his brother and the other trustees (867, 915).

Mr. Brandeis exerted no improper influence in the matter (881).

When what was believed to be a wholly groundless and unwarranted attack was made upon Mr. Warren and his removal as trustee sought, it was certainly the province of counsel for the trustee, who had been such during the entire administration of the trust, to support him as counsel in defending the integrity of his administration of the trust (1259). Such knowledge as counsel for the trustee and his firm had, came to them from the trustee and his firm in that employment, and the trustee and his firm were entitled to the full benefit of that knowledge. If they had employed new counsel, they could rightly ask that everything known to their existing counsel should be communicated to the new counsel. It would have been virtually a

desertion if the counsel for the trustee and his firm had failed to act (1259).

Three out of the four beneficiaries opposed the litigation and desired the retention of Mr. Warren as a trustee.

No claim was ever made in the case but that the defense ought to be made by Brandeis, Dunbar & Nutter on Mr. Warren's behalf (1298).

As to the transactions which led up to the suit, the leading counsel for the plaintiff said that he did not claim that the arrangement was ever gotten up, either by Mr. Brandeis or Mr. Warren, for the purpose of violating a trust (1164).

In order to condemn Mr. Brandeis for anything done in this whole matter one must emphasize every suspicion and minimize the prominent facts shown by the weight of the evidence. I agree with Mr. Whipple, the leading trial lawyer for Edward P. Warren, the complaining heir, that if Mr. Brandeis thought that Edward had assented (and how could a reasonable man assume otherwise?), "there was no violation of trust; and there was no moral wrong" (284).

#### NEW YORK & NEW ENGLAND RAILROAD MATTER.

It is charged that Mr. Brandeis was engaged at the instance of the New York, New Haven & Hartford R. R. to wreck the New York & New England Railroad Co. The facts do not sustain this charge.

At about the beginning of 1892 Austin Corbin, of New York, was the president and director of the New York & New England Railroad (404). The railroad was in a very bad financial condition and already wrecked. Corbin took the presidency with a view to rehabilitating it. He also got friends to invest in stock of the company and he expected them to become directors (405). Several of the directors who he thought were acting improperly declined to resign. These directors were represented in the later litigation by Mr. Storey (405). Accordingly, Mr. Corbin decided to resign himself, as he refused to stay on the board of directors with them. He believed they were using their position to benefit themselves at the expense of the road (405.) On resigning, Mr. Corbin consulted William J. Kelly, his attorney, who is now one of the judges of the Supreme Court of New York. Mr. Kelly employed Mr. Brandeis to institute suits to have the railroad put in the hands of a receiver in Massachusetts, Connecticut, and New York. These suits were never filed, because the action of the directors necessitated other proceedings. They declared they were about to pay unearned dividends, and the suits were immediately brought and injunctions were obtained to prevent this (405). They also attempted to issue bonds beyond the legal limit and suits were brought to prevent this. These also prevailed (405). Suits also were brought to prevent leases made to the company by these directors of railroads claimed to be owned by these directors and leased at an improper rental (409). These suits were brought on behalf of all stockholders, of whom Mr. Corbin was one, and particular stockholders were selected as plaintiffs in order to give the Federal courts jurisdiction (411). Mr. Corbin's connection with the suits was well known. The hostile directors knew it well (411). He indemnified the plaintiffs (411).



All the suits were brought between April and August, 1892 (422). It was alleged in the suits that they were brought at the expense of persons other than the plaintiffs and to depress the credit of the railroad, and this was held to be immaterial (427).

Subsequently, in an investigation before a committee of the Legislature of Massachusetts in May, 1893, it was claimed on behalf of the New York & New England Railroad Co., by Mr. Moorefield Storey, that these suits had been instigated by the New York, New Haven & Hartford Railroad Co. or in its interests. Mr. Brandeis then testified that he had no knowledge of any such connection. Mr. Josiah H. Benton, the attorney for the New York, New Haven & Hartford Railroad Co., stated that there was no such connection (439).

Judge Kelly now says that in the latter part of 1893 he learned from Mr. Corbin that he had concluded that the chance of reorganizing the road was gone, and that the first mortgage was inevitably going to be foreclosed, and that he was disposed to give up the litigation; and later he learned from Mr. Corbin that certain men interested in the New York, New Haven & Hartford Railroad Co., which was interested in the first-mortgage bonds, had expressed a desire that litigation should not be given up and that they would reimburse Mr. Corbin for expenses thereafter (412).

Mr. Brandeis was not employed to wreck the New York & New England Railroad (406), and had no knowledge that the New York, New Haven & Hartford Railroad Co. was interested in the litigation when he testified in May, 1893. His last substantial work in the cases was done in June, 1893 (700). He was paid by Judge Kelly, who received the money therefor from Mr. Corbin (408).

It was said in the present hearing that the suits were begun at the instance of the New York, New Haven & Hartford Railroad Co. (267, 415), and that the United States, in the recent suit against the directors of the New York, New Haven & Hartford Railroad Co., had so contended. The fact is to the contrary. The Government's contention was in accordance with the foregoing statement from Judge Kelly, namely, that they were started by Mr. Corbin and that subsequently the directors of the New York, New Haven & Hartford Railroad Co. took them over (419, 700).

There was nothing to indicate that the suits were not meritorious or brought for the purpose for which they purported to be brought. They were found to be well grounded as far as they progressed. Since it appears that the Massachusetts Legislature investigated this matter 23 years ago, and that now Judge Kelly, chief counsel, acquits him of any purpose to wreck the railroad, and that Josiah H. Benton, chief counsel of the New Haven & Hartford Railroad, testifies that that railroad had no connection with the suits brought by Mr. Brandeis, I can find neither reason nor excuse to justify anything but an unequivocal vindication of the nominee from this charge.

#### DINGLEY BILL WOOL DUTY.

No charge touching Mr. Brandeis appears to have been suggested in this matter.

In 1908 charges were made that William Whitman had, in 1897, secured an exorbitant duty on wool tops, to the detriment of other woolen manufacturers in the association which Mr. Whitman repre-

Mr. Whitman did not know Mr. Brandeis in 1897, or have anything to do with him prior to 1905 (690), and Mr. Brandeis has never acted for Mr. Whitman in any tariff matters (973).

When the charges above stated were made against Mr. Whitman in 1908, he consulted with Mr. Brandeis with reference to making an answer to these charges. Mr. Whitman stated his case to Mr. Brandeis and Mr. Brandeis assisted him in preparing a reply (961). In view of the testimony of Mr. Whitman in the lobby investigation (of 1913), the committee, on its own motion, subpœnaed Mr. Whitman and Mr. Ingersoll in order to find out all the facts concerning Mr. Brandeis's appearance before the congressional committee having in charge the Stevens bill, and the true history of Mr. Whitman's defense to what are known as the "North charges."

I fail to find anything in either which reflects upon the nominee.

#### LEGISLATION CONCERNING INTOXICATING LIQUORS.

No charge has been made against Mr. Brandeis with respect to this matter. It appears that 25 years ago he appeared in opposition to certain legislation relative to the sale of intoxicating liquors, and in support of certain other legislation then under consideration before the Massachusetts Legislature, and that this appearance was in behalf of associations engaged in the sale of liquor (1055).

This was in a State that never has had a prohibitory law, but has long had laws regulating the liquor traffic. There is nothing to indicate that Mr. Brandeis's attitude was or is favorable or adverse to a prohibitory law in a community where public sentiment wants it.

There is nothing to indicate that his attitude 25 years ago was in any way favorable to the intemperate use of liquor (1057), or that the legislation which he sought was morally wrong from the viewpoints of that period.

Public sentiment upon the question of prohibition has undergone radical change in the last 10 years, not to say 25 years. The argument of an attorney 25 years ago is not even persuasive of his views now. Generally speaking, it is unfair to make one's views, within legitimate limits, the test of a vote on his confirmation as judge. The honest, capable judge only construes the law, and it should be assumed that the good lawyer, "wet" or "dry," when elevated to the bench, will not presume to legislate. Only a dishonest judge would distort a record or evade a reasonable conclusion, whether it suited him or not.

#### UNITED SHOE MACHINERY CO.

The United Shoe Machinery Co. has charged that Mr. Brandeis has been guilty of unprofessional conduct in acquiring information while connected with that company and using it at a later date in the interest of other clients. This charge involves a history of the company as well as the evolution of trusts and the laws applicable to them.

The tying-clause system, so called, of the United Shoe Machinery Co. was not created by Mr. Brandeis. He severed his relations with the company because of his disapproval of this system. *Three and one-half years elapsed after his resignation from the company before he*

*advised any other client on the subject.* In this advice and in all subsequent action which he took he made no use of any confidential information; but, on the contrary, the facts seem to have been public property well known to the shoe manufacturers (703, 747).

The United Shoe Machinery Co. was organized early in 1899 and acquired the business and assets or a majority of the stock of Goodyear Shoe Machinery Co. (and other Goodyear companies), McKay Shoe Machinery Co., Eppler Welt Machine Co. (and another Eppler company), Consolidated & McKay Lasting Machine Co., and Davey Pegging Machine Co. (703).

About a year before the organization of the United Co. negotiations had been undertaken to bring these companies together, and Mr. Brandeis had opposed this in the belief that on the terms then proposed it was better for the McKay Co. to remain as it was (703).

The negotiations for the consolidation, which went through in 1899, were conducted principally by Mr. Elmer Howe, Mr. James J. Storrow, and Mr. Winslow (703). Mr. Howe was an experienced lawyer and for all practical purposes in charge of the Goodyear Co. Mr. Storrow was of the firm of Fish, Richardson & Storrow, one of the leading firms of patent lawyers of the country. They were counsel for the Eppler Co., the Consolidated & McKay Co., and the McKay Co. Mr. Storrow had or represented a large interest in the McKay Co. (703).

The companies had for a long time put their machines out on leases containing restrictive conditions as to their uses, tying clauses, so called (174, 704, 734), similar in form to those afterwards continued by the new company.

A complete investigation indicates that Mr. Brandeis was not asked nor did he render an opinion as to the legality under the Sherman antitrust law of these clauses of the leases or of the consolidation itself at any time prior to 1906 or 1910 (704, 733, 745, 744).

Before the consolidation the matter of working agreement between the companies was considered, but Mr. Howe thought that this might be contrary to the Sherman law and that there should be a new company which should acquire a full title to the property or stock of the old companies (704).

It should be noted that after the decision in the Knight case (156 U. S., 1) in 1895 and at least until the decision of the Northern Securities case (193 U. S., 197) in 1904, and of the Wall Paper case (212 U. S., 227) in 1909, many lawyers believed that the Sherman antitrust law did not prohibit the acquisition by one company within a single State of the assets of a competitor even if the manufactures of both were going into interstate commerce.

Mr. Brandeis joined with the eight other directors of the McKay Co. in signing the circular to the McKay stockholders recommending that they exchange their stock (255, 704).

Mr. Howe at once became the leading counsel (182, 178, 704, 733) for the United Co., and he became also a member of the executive committee. Mr. Brandeis became a director. He never became general counsel for the company or legal or business advisor on the general policies of the company (704). He was concerned with the general policies of the company only to such extent, if any, as Mr. Winslow or others talked with him about them as a director (184).

Mr. Brandeis and his firm were employed from time to time in specific matters for which specific charges were made (705). The last employment was in a matter begun in 1906, and the only matters which lasted after January 7, 1907, were two begun in 1904 or earlier.

In the winter and spring of 1906 legislation was proposed in Massachusetts to prohibit anyone from imposing in the lease or sale of a patented machine a condition that the lessee shall not use the machines of another, and from offering unreasonable discounts which would prohibit such use (218, 705, 713). This proposed legislation was believed to be aimed at the United Co., and to emanate from one or more machinery manufacturers (1153) and not from shoe manufacturers.

Mr. Brandeis believed on the information which he then had, or which he was given by Mr. Winslow, that the methods of the United Co. were beneficial particularly in that their leasing system and uniform terms to all worked to the advantage of the small shoe manufacturers (217, 705), and that the shoe manufacturers were content with the terms of the leases. At this time Mr. Coolidge, one of the counsel for the United Co., and who was experienced in legislative matters, was ill, and Mr. Winslow requested Mr. Brandeis to act (221, 705). He did so, and in April, 1906, he appeared before a committee and argued (232) against the proposed legislation, adopting the facts furnished him by Mr. Winslow (187). He stated that he was counsel for a large number of shoe manufacturers (228) and Mr. Winslow then knew of this fact (228, 179).

He, Mr. Winslow, denied it emphatically (181) on February 16, 1916, until confronted with the statement (228).

In May, 1906, Mr. Brandeis undertook to secure the assistance of some of these shoe manufacturers, Mr. McElwain, Mr. Jones, and Mr. Bliss, to support the opposition to the proposed legislation (218, 714). He then learned that they objected to the tying clauses in the leases (218, 715). Nevertheless, it was arranged that they would join in the opposition, but upon the understanding that Mr. Winslow would take up the adjustment of the differences, by conference with them, without legislation (176, 717). Mr. McElwain asked Mr. Winslow to appoint a time for the conferences, and Mr. Winslow expressed the desire to postpone them until fall, as he was about starting for Europe, and this was satisfactory to Mr. McElwain (218, 722). The bill in the legislature failed to pass.

In September, 1906, Mr. Brandeis wrote to Mr. Howe, counsel and member of the executive committee, calling to his attention the great significance of the decision rendered August 22, 1906, by Judge Seamans in *Indiana Manufacturing Co. v. J. T. Case Thrashing Machine Co.* (148 Fed., 21), holding that there might be a monopolistic combination of patents contrary to the Sherman antitrust law (723).

Mr. Winslow says that Mr. Brandeis before his resignation and acceptance of other employment never gave any "intimation" that there was "any legal or moral" wrong in the company's organization or methods (240).

On October 5, 1906, Mr. Brandeis, in response to a letter of criticism from Mr. Erving Winslow, a stranger to the company, wrote him reciting what he had ascertained the preceding spring and defending the company's methods (162).

On October 6, 1906, Mr. Erving Winslow replied, saying that even on the facts stated he thought that the company was open to criticism (724).

After Mr. Winslow's return from Europe about October (181) some conferences (228) took place between Mr. Winslow and Mr. Jones and Mr. McElwain, in which they disclosed more fully the objections to the exclusive use, full capacity, and tying clauses, but nothing was accomplished toward the removal of any of these clauses (221), and Mr. Winslow did not discuss the matter much (227, 725, 727).

Mr. Brandeis became convinced by these new disclosures that the company's policy was questionable and also that nothing was going to be accomplished (221) and that he must either take the matter up in the board of directors and fight, probably unsuccessfully, with Mr. Winslow and his associates or retire from the company (221). On December 6, 1906, Mr. Brandeis resigned from the board of directors without assigning this difference of opinion as a reason in his letter of resignation (163), but Mr. Winslow understood perfectly that Mr. Brandeis's desire not to be a party to the existing policy of the company was the reason. Mr. Winslow telephoned him on December 11, before his resignation had been accepted, and said, "I am very sorry to have you go, and don't want you to feel that there need be any embarrassment on your part; but of course if you think, in view of what may be called up this winter, you would rather not be there, we do not want to insist upon it" (726). Mr. Brandeis replied that it might be embarrassing both to Mr. Winslow and to him, and that if they did not agree as to the course to be pursued he might, if he were a director, feel called upon to bring the matter up before the board (726). It had been announced already (179) that there would be an effort in the coming winter to get legislation against the practices of the company (726).

Efforts to get the company to make some changes continued and Mr. Winslow had long conferences with Mr. Brandeis on January 2 and January 7, 1907 (726), at which Mr. Brandeis urged his objections at length to the tying and other clauses, but Mr. Winslow was unwilling to make any change (177, 178, 179, 180, 730). Mr. Brandeis told him that by making the changes, they could avoid trouble (182). Later (735), in a letter to Mr. Winslow referring to this interview, Mr. Brandeis speaks of the "radical differences between your opinion and mine when we last met" (237). Mr. Winslow replied the next day, saying, "We value your opinion in these matters very highly, even if we do not decide that we can follow same at this time" (735). Mr. Brandeis had become convinced by this time that while the policy and methods of the company had on the whole operated beneficially up to that time, they must, if pursued, eventually prove injurious, both to the community and the company's interest; and he urged most strenuously upon Mr. Winslow and the officials who participated in the conference with him that these methods be changed, that the policy of monopoly be abandoned, and particularly that the tying clauses be eliminated from the leases (219).

Mr. Winslow testified on direct examination that he knew of no reason for Mr. Brandeis's resignation except that expressed in the letter (175), and that at the later conference of January 7, 1907, "he

expressed a desire that the United Co. make changes in its leases, but he made no concrete suggestion, though asked to do so," and left the inference clear that his severance of relations with the company had nothing to do with this (163). In his widely published attack on Mr. Brandeis in the spring of 1912, he said that during the time that Mr. Brandeis was director and counsel "there entered his mind no doubt whatever of the propriety and legality" of the company's policies and methods. In his published letter of January 19, 1912, attacking Mr. Brandeis, to Senator Clapp as chairman of the Committee on Interstate Commerce, he says that up to the day that Mr. Brandeis accepted employment by clients having hostile interests, he never gave any "intimation" of any legal or moral wrong in the company's organization or methods, and nowhere in the letter does he refer to the fact that Mr. Brandeis had suggested any changes of policy. In his published letter of February 29, 1912, to Senator Clapp, he refers to the fact that Mr. Brandeis's letter of resignation shows "no uneasiness in Mr. Brandeis's mind as to the soundness of the company's policy or the propriety of its methods."

At the time of testifying on direct examination and at the time of these publications, Mr. Winslow had in his possession the letters of September 12 and 13, 1907, and Mr. Brandeis's narrative of the facts (221, 227). His answers on cross-examination showed his full consciousness of the stand which Mr. Brandeis had taken (177, 178, 179, 180, 182, 237).

After January 7, 1907, Mr. Brandeis never acted as counsel for the company and no new matters were taken to his firm. One of the members of the firm continued to act in one litigation which involved no question of tying clauses or monopoly (731). This litigation was begun to secure the return of certain machines claimed to be the property of the company. This was tried in December, 1906, was argued on exceptions in November, 1907, and decided in January, 1908 (734). Other suits followed as a result of this decision, and the company retained other counsel for them. Incidental services were rendered in this connection until 1909.

In the legislative proceedings in 1907, and in all new matters, the company employed other counsel (183, 734).

Mr. Brandeis's termination of relations with the United Shoe Machinery Co. was due to his unwillingness to be identified longer with their policies, which he then expressly disapproved, because of the objections pointed out by the shoe manufacturers and others in the fall of 1906 (219) which came to him after he had expressed to Mr. Howe the possible significance of the decision of Judge Soamans in the legal situation (723). His severance of relations meant the loss of a client (727) and was without expectation of advantage to himself, financial or otherwise.

During the following three and one-half years he had nothing to do with shoe machinery matters (219), and in 1907 declined to act for Mr. Plant (735), a potential rival of the United Co. (222).

On April 30, 1907, the supreme judicial court gave to the legislature, in response to its request, an opinion that an act of the kind proposed aimed against certain of the clauses in use by the United Co. in its leases would be constitutional (220) (193 Mass., 605). Such an act was passed on June 1, 1907 (219-222). The company attempted to avoid the prohibition by adding to its leases a provision in substance, that any provi-

should not be deemed to be binding, and also a provision reserving to the company the right to cancel the lease on 30 days' notice (222). A use of new machines in contravention of the language of the tying clauses involved thereafter to the shoe manufacturers the double danger of a decision that the clauses were valid and of a 30-day termination at the will of the company (222, 737).

In June, 1910, Thomas G. Plant, the owner of two-thirds of the stock and the executive head of the Thomas G. Plant Co., a large shoe manufacturer, claimed to have perfected a complete line of shoe machinery which was installed in the shoe factory of the company. Other shoe manufacturers had this examined in their interest and received a favorable report. Mr. Charles H. Jones, of the Commonwealth Shoe & Leather Co., who had been a client of Mr. Brandeis and his firm for over 15 years, asked Brandeis, Dunbar & Nutter for an opinion as to whether he could legally take the new machines or whether the leases were enforceable to prevent them (223, 736).

They reached the conclusion that under the conditions which then existed and in the light of the decisions rendered, notably the Wall Paper Trust decision (212 U. S., 227), rendered February 1, 1909 (219), that the company was then a combination in restraint of trade and that the leases were unlawful as essential parts in perpetuating its monopoly, and were in themselves restraints of trade, and that the fact that the machines were patented did not relieve the leases of this objection, because designed to create a monopoly in excess of the patent. They so advised Mr. Jones (163, 736). Other manufacturers received the same advice from able counsel (223).

When this opinion was given the leases were public property, the opportunities, theoretic and practical, of getting shoe machinery from the United Co., or from any other source, and the practical possibilities of installing and using an entire new line of machinery at one time were known to the shoe manufacturers. The essential facts for forming the opinion rendered were not obtained from the United Co., confidentially or otherwise (744).

Mr. Winslow, on direct examination and in his published letters, used language and made omissions calculated to create a contrary impression (160, 164); but he was unable to think of a single fact in support of the unfounded insinuation (185, 249), and when the question showed that he perceived the truth, Mr. Winslow receded to the point that his real criticism of Mr. Brandeis was *untruthfulness*, *not use of private information*.

He said, "I do not criticize Mr. Brandeis's acting for anyone if he had at all times scrupulously, or I might say, fairly, confined himself to statements that were correct or true" (202).

When this opinion was rendered to Mr. Jones, Brandeis, Dunbar & Nutter were as free in right and propriety to render it as any lawyers at the bar, and it was rendered to one who had been their client from a time before the United Co. existed or was thought of. They received compensation for this opinion (1154).

It was given to Mr. Jones for his guidance and not as an advertising weapon. Mr. Jones has testified that he showed it to Mr. Plant and Mr. Plant published it. Neither Mr. Brandeis nor his firm had any part in any scheme of Mr. Plant's, if any there was, to force the United Co. to buy him out (253).

At about this time—summer of 1910—Mr. Brandeis, in response to a question in casual conversation from Mr. Barbour, a member of the executive committee of the United Co., told him that in his opinion it would be unlawful suppression of competition for them to buy out Plant or his patents (219, 223).

The company bought out Plant on September 23, 1910, and at a time when a group of large shoe manufacturers from St. Louis were considering the purchase.

Two of these manufacturers, Mr. Jackson Johnson and Mr. Milton S. Florsheim, then conferred with Mr. Winslow. He says that they proposed that they be permitted to acquire stock in the United Co. on unduly favorable terms, and be given better terms on their shoe machinery than was accorded to other manufacturers (196, 191). They deny this (192, 193).

During the following fall and winter (200) these and other manufacturers formed the Shoe Manufacturers' Alliance, designed to secure an opportunity to acquire shoe machinery, whether by purchase or lease, on terms that left the shoe manufacturers free to choose one or more machines at a unit price (163); that is, without tying or exclusive-use clauses. Their object was to get the freedom which Mr. Brandeis had advised the United Co. four years before that they ought to give.

Apparently the information which started the proceedings of the United States against the United Co. came from sources disconnected with this alliance and before Mr. Brandeis acted for them (739).

On January 4, 1911, a resident of Fall River, Mass., wrote the Attorney General about the matter. In consequence, on January 11, 1911, the Department of Justice asked the United States attorney for Massachusetts for information on the subject, and by March the representatives of the Government were making investigations at the offices of the company (201).

On May 3, 1911, the Western Shoe Manufacturers related to the Senate Committee on Finance the alleged monopolistic position which the United Co. had attained (Senate Hearings on the Tariff, 1-5, 1911, p. 3, Cong. Lib. H. F. 1756-a3-1911).

On May 4, 1911, in debate on the farmers' free list, in the House, Mr. Thayer, of Massachusetts, quoted the act passed in Massachusetts in 1907 and severely attacked the United Co. as a trust (Cong. Rec., 62d Cong., 1st sess., vol. 47, pt. 1/2, 953-954). This was followed by his introducing a bill on June 8 (pt. 2, p. 1808).

On May 9, 1911, Senator Gore introduced a resolution for an investigation into the use of patents in the creation of monopolies (pt. 2, p. 1072) (740).

The subject matter of the proposed legislation was the betterment of conditions as they existed in 1911, and not an attack upon past acts. The same is true of the equity suit brought by the Government and the indictment was limited to offenses committed since 1908.

On May 22, 1911, for the first time, representatives of the Shoe Manufacturers Alliance consulted Mr. Brandeis and he said that he was willing to act if what they were after was not special terms but freedom in the acquisition of shoe machinery for themselves and their competitors. They were in accord with this purpose and showed no hostility to the United Co., but the reverse (224, 737).



One of the first steps taken by Mr. Brandeis was to endeavor to ascertain what sources for shoe machinery were in existence (738).

In response to the request of the shoe manufacturers, Mr. Winslow apparently for the first time submitted to them a scheme for separating the different departments so that they would be independent of each other (201-260).

About this time, The Standard Oil decision (221 U. S., 1), having been rendered in May, Mr. Matz, one of the directors of the United Co., requested Mr. Winslow to bring the relations of the Government before the directors and to have Mr. Brandeis and Mr. James A. Garfield, his friend and lately Secretary of the Interior, talk to the directors. It was known that Mr. Brandeis was acting for the Shoe Manufacturers Alliance (200). On June 17, 1911, Mr. Matz had sought advice from Mr. Brandeis and he had advised him to resign, as he, Brandeis, had done in 1906 (227, 741). Mr. Garfield advised Mr. Matz to bring the matter before the directors and this was done on July 12, 1911 (221). At this time Mr. Brandeis stated fully to the directors his own course in severing his connection with the company at the end of 1906, his reasons therefor and his belief as to the effect of the company's course as a suppression of competition (221, 227).

When Mr. Winslow attacked Mr. Brandeis in his published letter of January 19, 1912 (217), to Senator Clapp, Mr. Matz gave Mr. Brandeis permission to write to Senator Clapp what Mr. Brandeis had said at this meeting, concerning his own course, and Mr. Brandeis did so (217, 221), omitting any reference to the fact that he had attended at Mr. Matz's request. Mr. Winslow, well knowing this fact (201), described the meeting in his published letter of February 29, 1912, to Senator Clapp as a "part of the same campaign," i. e., that for the Western Alliance of Shoe Manufacturers.

In the following December (14, 15, and 16), 1911, Mr. Brandeis in the course of a 3-day discussion before the Senate Committee on Interstate Commerce as to trusts, made reference to the United Shoe Machinery Co. as an illustration of the ultimate effect of a monopoly however innocently created and prudently managed (741).

In these remarks Mr. Brandeis made no point of the advantage of his former connection with the company.

Mr. Winslow in his testimony says that Mr. Brandeis's words carried added weight because of his known former connection (165, 202). In his letter to Senator Clapp January 19, 1912, Mr. Winslow criticized Mr. Brandeis for failing to disclose this former connection and promptly himself gave the added weight, if any.

On January 26, 1912, before the Judiciary Committee of the House in the hearings on the Thayer bill, the Lenroot bill, and the Peters bill (743, p. 13), and on February 16, 1914, before the Judiciary Committee of the House, he spoke on the same subject.

The statements made in these hearings (1025-1050), which Mr. Winslow says are false (166-168), are statements of inferences fully warranted by the information furnished by shoe manufacturers, and others familiar with the real situation, and by the fact that these manufacturers do not know where they can get sufficient equipment of the necessary machines, except from the United Co. (746).

Some of the leases of what are regarded as essential machines provide in substance that on failure to observe the conditions of the

exclusive use, additional machinery, or tying clauses of that or any other similar lease from the company, the company may terminate not only the particular lease, but all other leases from the company.

Mr. Brandeis's statements concerning the effect of the United Co. upon Mr. Plant's credit were clearly expressed to be his own inferences (167). The hostility of the United Co. with its great power would tend to reduce and perhaps to destroy Plant's credit even if the company did absolutely nothing. Mr. Plant, who did not testify in the suit of the United States against the United Co., had said, in August, 1910, that the company had cut off his credit in Boston and that he must therefore try New York (746). He says there was a definite basis for this belief. In New York negotiations were taken up with Mr. Evans and Mr. Wallace, of New York, and in the course of them Mr. Wiggin, of Chase Bank, a director of the United Co., spoke to Mr. Evans about the matter. It appears that Mr. Wiggin brought one of the attorneys for the United Co. into communication with Mr. Evans and Mr. Wallace (747). He says that he did not discourage the financing, but Mr. Plant did not know that and did not learn that they were in communication.

It is not possible to try out in detail the accuracy of Mr. Brandeis's statements; but enough has been said to show that there is no warrant for any of Mr. Winslow's assertions that they were not scrupulously truthful.

These services have been without compensation to Mr. Brandeis (742).

The most significant fact in this case is that Mr. Brandeis voluntarily and with no prospect of profit to himself gave up his connection with a profitable client as soon as and because he became convinced that the policy which it was pursuing and would not change was wrong. Four years later, and again without desire for profit to himself, he gave his assistance to the effort to stop what he believed would be the future and increasing effect upon the community of that wrong policy. It may well be asked, How long does an employment mortgage the lawyer's conscience? After all, what "private information" was divulged? I can not see that there was any.

#### GILLETTE CASE.

It is urged that the action of Mr. Brandeis, taken for Mr. Gillette in the organization of the Gillette Securities Co., was unprofessional because of its effect upon Mr. Joyce. (Richardson, 355 to 371; Williams, 372 to 384.) This contention seems to me to be far-fetched, if there can be found, indeed, the slightest reason to urge it.

Mr. Brandeis and his firm acted as counsel for Mr. Gillette, beginning about 1901 (887). In 1906 suits were brought against Gillette, Joyce, Curran, Holloway, and Heilborn (888), claiming that they had conspired to obtain, and in consequence had obtained, stock of several stockholders of the Gillette Safety Razor Co. by false representations, and that the defendants had also, as directors of the company, paid Gillette, Joyce, and Holloway excessive salaries. The defendants made a joint defense, and Brandeis, Dunbar & Nutter acted for them in so doing.

During the pendency of the suits Mr. Gillette and Mr. Holloway became convinced that Mr. Joyce was cooperating with another

stockholder in measures to oust Mr. Holloway and possibly Mr. Gillette from their official positions in the company (889). Mr. Joyce probably had other counsel (889). Mr. Gillette and Mr. Holloway obtained the cooperation of other stockholders to guard against the ousting of Holloway and Gillette. In order to obtain a majority of the stock it was necessary to secure the stock or the cooperation of Mr. Stewart and Mr. Flaccus, plaintiffs in the pending litigation (889) and believed to be the clients of Mr. Richardson with whom Mr. Williams was supposed to be cooperating because he had clients having a similar interest (888).

Mr. Brandeis acted for Mr. Gillette in some of the conferences with Mr. Richardson, which resulted in the purchase by Mr. Gillette of Mr. Flaccus's stock and an agreement between Mr. Gillette and Mr. Stewart whereby Mr. Stewart exchanged his stock for stock in a holding company which was formed to acquire a majority of the stock of the razor company (889).

There was nothing in the proceedings that bore any relation to the pending suits, except that the sale of Mr. Flaccus's stock involved his giving up the pending suit, and this was by so much to the advantage of Mr. Joyce (891).

The facts of this matter became known to Mr. Joyce about January, 1907. Brandeis, Dunbar & Nutter continued the defense of the pending cases for all of the defendants and obtained a decision wholly favorable to all the defendants except Mr. Heilborn. Before this decision had become final, other suits had been brought against Mr. Heilborn and Mr. Joyce, not including Mr. Gillette or Mr. Holloway. In these Mr. Joyce's counsel, Hurlbut, Jones & Cabot, appeared for Mr. Joyce. They also appeared in the Stewart case, Mr. Jones, of that firm, having stated that Mr. Joyce thought that his interests might differ from those of Mr. Holloway, so that he wanted to be separately represented (892).

In connection with negotiations with Mr. Stewart to have him join in exchanging his stock for stock in the holding company, Mr. Gillette agreed to cause him to be elected an officer of the company. Mr. Gillette subsequently did all that he could to carry out this agreement, through action by the board of directors in which he and those in sympathy with him did not have a majority of the votes. Before the next annual meeting, Mr. Gillette bought Mr. Stewart's stock and so terminated his obligation by agreement with Mr. Stewart (986).

At a later date, Mr. Joyce purchased Mr. Holloway's stock in the holding company and then brought a suit to dissolve the holding company or to convert his holding company stock into stock in the razor company, which would have given him a majority of the stock in the razor company (893). Subsequently, in December, 1911, Mr. Joyce bought Mr. Gillette's stock, or a substantial part of it, and thereby secured control and the suit was dismissed (893).

There was nothing to criticize in Mr. Brandeis's connection with the matter at any point (883).

#### ILLINOIS CENTRAL RAILROAD PROXIES.

It is charged that Mr. Brandeis misrepresented his relation to the procuring of the proxies for the meeting of the stockholders of the Illinois Central Railroad Co. in the fall of 1907. (Peabody, 754.)

On May 19, 1908, Mr. Joseph B. Warner, the chairman of the commission on commerce and industry, in committee of the Massachusetts Legislature, in supporting the position taken by the majority of that commission in favor of the New York, New Haven & Hartford Co. against the opposition of the minority (638, 639), referred to Mr. Brandeis, who opposed the position taken by the majority of the commission. In the course of his remarks Mr. Warner referred to Mr. Brandeis's activities in connection with the obtaining of proxies for the meeting of the stockholders of the Illinois Central Railroad Co. On the same day, May 19, 1908 (697), Mr. Brandeis wrote to the chairman of the committee a precise statement of the exact relation of himself and of his firm to these proxies (352).

In the fall of 1907 Mr. Brandeis's partner, Mr. Nutter, was requested by Mr. Catchings, of the firm of Sullivan & Cromwell, New York, to supervise the solicitation in and about Boston of proxies in the interest of the existing board of directors of the Illinois Central Railroad Co., of which Mr. Harrahan was the president and Mr. E. H. Harriman an important member. The opponents in this contest were a faction headed by Mr. Fish. Mr. Nutter appealed to Mr. Brandeis before taking the matter up to assure himself that there was nothing in it that would conflict in any way with the work Mr. Brandeis was doing in connection with the attempted so-called merger of the Boston & Maine Railroad with the New York, New Haven & Hartford Railroad. Mr. Brandeis made special inquiries to assure himself that there was no conflict and that the side which was advocated by Mr. Catchings, in the internal difficulties of the company, was one which appeared to be for the best interests of the stockholders (340). There was nothing to indicate, and there is nothing now to indicate, that either side in this controversy had any relation to the railroad situation in New England. Mr. Brandeis "was expected to do nothing, and he did do nothing," in this matter (342), and the evidence is consistent with the statement in the letter of Mr. Brandeis to the chairman of the House Committee on Railroads (352). It would seem that anyone looking at the evidence (353-354) and the letter signed by Alfred Jaretzki, and noting the failure to produce Mr. Jaretzki, could not fail to dismiss this charge as wholly unsupported.

#### LENNOX CASE.

The claim asserted in this matter is that Mr. Brandeis was guilty of unprofessional conduct in accepting employment as counsel for P. Lennox & Co, or James Lennox, and then acting against them.

P. Lennox & Co., a partnership consisting of Patrick Lennox and his son, James T. Lennox, and doing a large tanning business in Lynn, Salem, and Peabody, Mass., found themselves seriously crippled financially at the beginning of September, 1907. At this time the active partner was James T. Lennox. His father had been inactive in the business for about 10 years. This financial embarrassment led James T. Lennox to send for Mr. Stein of the Abe Stein Co., of New York (1104), who was a creditor (Whipple 286). Mr. Stein and his counsel, Mr. Stroock, reached Boston on the night of September 3, 1907; and on the morning of September 4, they had a conference with James T. Lennox; Mr. Spaulding, of the Columbia Kid

Co., conducting a selling agency (778) for P. Lennox & Co., and Mr. Coburn, treasurer of the Tracy Bros. Leather Co., in which James T. Lennox owned an interest (770; Stroock, 311). On learning of the financial situation, Mr. Stroock suggested that as he was counsel for Mr. Stein and not a Massachusetts lawyer, Mr. Lennox ought to have counsel (1073, 1114). He suggested Mr. Brandeis, and he being satisfactory to Mr. Lennox, Mr. Stroock called on Mr. Brandeis on the morning of September 4 (1074) to arrange an interview.

The subject under consideration at this time was the possibility that Mr. Stein might make Mr. Lennox a further loan, if the prospects were such that this was safe and likely to bring success. (Stroock, 315; Whipple, 286; Brandeis letter, 289, 1099.) Mr. Stein was ready to make the loan (1105).

Mr. Stroock arranged (1076) with Mr. Brandeis for an interview and soon after 10 in the morning of September 4 (Stroock, 310, 1014), Mr. Stein, Mr. Stroock, Mr. Lennox, Mr. Coburn, and Mr. Spaulding called together on Mr. Brandeis. He had never met Mr. Stroock or James T. Lennox (Stroock, 312), and never has met Patrick Lennox.

Shortly after the interview began (Stroock, 311), or in the afternoon, a stenographer was called in and took notes of the interview (1014; stenographer's report, 775). The first thing dictated was a form of letter which apparently Mr. Stroock desired to send to certain concerns holding leather received from P. Lennox & Co., to which Mr. Stein asserted title under the terms of certain trust receipts (Stroock, 313), under which he had originally supplied the skins to P. Lennox & Co. (788, 1014). This was dictated in the presence of all (1077, 1112).

The interview lasted into the afternoon, or, as Mr. Stroock put it, consisted of two interviews on that day, at both of which all the same persons were present (Stroock, 310). Mr. Stroock's recollection is that it was at the afternoon interview that the stenographer was present first (311) and that the morning conference lasted but a few moments (311). Mr. Stroock says that it was at the afternoon interview that Mr. Brandeis said, for the first time, that he could take the matter up (312), notwithstanding his firm's sometime relation to a creditor, Weil, Farrell & Co. The stenographer's report indicates convincingly that this remark did not occur until the following morning (788). She has no reference to such a statement on the afternoon of September 4 (775-787), and has one on the following morning inconsistent with the question's having been settled the day before (788). Other remarks which Mr. Stroock attributes to the afternoon of September 4 (312) do not appear in the stenographer's notes of that interview (775-786), but do in those for September 5 (790), notably Mr. Stroock's statement that—

I said that I saw no reason why Mr. Brandeis could not go over the matter and work out *the whole situation* for the benefit of all the parties, because it seemed to me that this was a situation where the *interests of the debtor* and the *interests of the creditors* were alike (312). [*Italics not in original.*]

Mr. Lennox says that the stenographer was present when Mr. Brandeis said he would take the case (1119) and that the first day, September 4, Mr. Brandeis said that he would not give his decision about undertaking his case until the following day (1131), and that on the following day he said that he would act as his counsel. This shows clearly that Mr. Lennox is testifying to the same things which

appear in detail and with precision in the stenographer's notes of September 5, hereafter referred to.

The conversation on September 4 was conducted openly in the presence of all and without any private communications between Mr. Lennox and Mr. Brandeis. *Mr. Lennox was at no time alone with Mr. Brandeis.* Mr. Stein was a creditor, Mr. Spaulding a debtor, Mr. Coburn a business associate and adviser (785). The conversation was long. The names of the principal creditors and the amounts of their claims were stated, and also the character and value of the assets (775-787). Mr. Lennox said that the partnership consisted of Patrick Lennox and himself (775), and it was not intimated even remotely that there was any question about it (Stroock, 313, 314). Mr. Lennox now says that the partnership consisted of his father and himself (1128). Mr. Lennox's statement of his assets and his liabilities showed clearly the insolvency of the partnership (775-786).

Mr. Brandeis then said:

Well, now, I think it perfectly clear that you ought to discuss this matter with your father. He has unfortunately not had any information up to now, but he ought to have it now, and he ought to know fully the situation, and he ought to consider whom he would like to have represent him (774-786).

Mr. Lennox said that his father would leave it all to him, and that as notes were coming due every day it was imperative that he do something (786).

Mr. Brandeis said that the situation was much more serious than he had supposed from what Mr. Stroock had said in the morning, and that he had very little doubt that it would be necessary to make an assignment to trustees for the benefit of creditors (786). Mr. Lennox was a man of 30 years' experience in business and accustomed to business in a large way and understood what an assignment for the benefit of creditors was (1119, 1123).

The interview closed with Mr. Brandeis repeating that Mr. Lennox should talk the matter over with his father, who might have some preference in the matter of counsel, and asking Mr. Lennox to make up a more detailed statement of assets and liabilities, and suggesting another conference early the next morning (787).

On the following morning, September 5, Mr. Lennox and Mr. Stroock called on Mr. Brandeis. Mr. Stroock says that the others were present also (311). The stenographer's notes do not show this (791). Mr. Lennox began by reporting that he had talked with his father, and that he had no suggestion to offer (791, 1122). Then, after a short talk about assets and liabilities, Mr. Brandeis said:

Well, now, Mr. Stroock, I should think that the question that we ought to decide now is whether I should act for Mr. Lennox in this matter or not. I of course understand you came to me after conference with Mr. Lennox to ask me whether I would act for Mr. Lennox.

To this Mr. Stroock replied:

May I ask you this question, Mr. Brandeis: From all you know, do you believe that you could remain in the case in view of your firm's position with Weil, Farrell & Co.?

To this Mr. Brandeis replied:

Yes, I think I could. The position that I should take if I remained in the case for Mr. Lennox would be to give to everybody, to the best of my ability, a square deal (792).

It seems clear that this conversation is the one which Mr. Stroock, testifying after eight years, has placed as occurring on the preceding day (312).

It is apparent that it was still being considered whether Mr. Brandeis should act in the matter at all. He followed this by saying that the only course for Mr. Lennox was absolute squareness and frankness to creditors, each to have whatever his legal rights might be. He said:

I should, if I acted for Mr. Lennox, see that he got his legal rights—no more and no less (793.)

Next he repeated that he thought an assignment for the benefit of creditors would be advisable. Mr. Stroock suggested the *possibility of bankruptcy if the assignment was made*. Mr. Brandeis said it was a possibility, but he thought that the creditors would want to avoid bankruptcy (793). Then Mr. Stroock suggested Mr. Brandeis's acting for Stein rather than as "attorney for trustee of the Lennox family" (793). Mr. Brandeis favored the latter course and said:

I should feel if I were acting for Mr. Lennox as trustee that it was the duty of the trustee to see that everybody got his legal rights as nearly as we could make it.

and in cases of doubt—

I should feel that we ought to have a committee of the creditors with whom the trustee could confer; and if there are any questions of doubt in adjustment, that we get the advice of that committee and through them make the proper settlement. (793.)

This is followed by repetitions of the same ideas in other words, with an explanation that an assignment would transfer all the property to the trustee for the purpose of liquidation and distribution to creditors (794); that the trustee could employ Mr. Lennox and that the trustee would have to determine with the creditors whether the business should be continued. This part of the discussion closed with Mr. Lennox's inquiry:

You are speaking now of Mr. Brandeis acting as my counsel?

To this Mr. Brandeis replied:

Not altogether as your counsel, but as a trustee of your property. (795.)

These are the conversations that determined the only understanding upon which Mr. Brandeis took this matter up; that is, as a trustee of this property for the benefit of the creditors and the debtors (1121). Mr. Lennox, Mr. Stroock, and Mr. Brandeis then agreed and now agree that the interests of the creditors and of the debtors were common and to realize as much as possible on their property, and not in conflict. (Stroock, 312; Whipple, 289; Lennox, 791, 1126.) Mr. Lennox asserted that his father also wanted to pay his creditors in full (791). They desired Mr. Brandeis's assistance to bring about this result.

All agreed, and now agree, that an assignment to a trustee for the benefit of creditors was the wisest course. (Stroock, 314, 795, 1088.) Indeed, there was no other course open except immediate bankruptcy proceedings.

Instead of Mr. Brandeis acting personally as trustee, it was agreed that Mr. Nutter should do so. (Stroock, 313.)

Up to the time that the assignment was made there had been no private communications between Mr. Brandeis and Mr. Lennox. They had never talked together alone. No papers had been shown or delivered to Mr. Brandeis. The attorney of the creditors was

there all the time. There was no reason to suppose that the facts concerning the condition of the business could be longer concealed, or that there was any desire or intention to conceal them.

Whatever may have been the occasion for coming to Mr. Brandeis in the first place, *the only employment which he accepted was that of trustee for the benefit of creditors or as attorney for such trustee* (827, 828). He was free to act. He was under no obligation to become or remain counsel for Mr. Lennox in opposition to this trust. He was not employed by any other client in this matter. He gave the only sound advice that could be given at that time, and everything which he did thereafter was consistent with, and required for, the performance of that trust (834).

The assignment was in the printed form (796) in use in the office. It described the assignors as Patrick Lennox and James T. Lennox, copartners as P. Lennox & Co., and the assignee as George R. Nutter. James T. Lennox signed it and gave Mr. Nutter a letter to his father, Patrick Lennox (314, 801). Mr. Nutter called on Patrick Lennox and told him that this was an assignment for the benefit of creditors, and told him what an assignment was (802). Patrick Lennox was in full (1122) possession of his faculties and in physical condition to be at his place of business the following day.

September 5, 1907, Mr. Nutter arranged with an audit company to begin work the next day to find out the exact financial condition.

On that day, pursuant to prior arrangement with Mr. Stroock and Mr. Lennox (795), Mr. Brandeis talked with numerous creditors, and told Mr. Lennox, Mr. Spaulding, Mr. Nutter, Mr. Stein, and Mr. Stroock, that he had told those creditors that the assignment had been executed but that they would like to avoid recording it (803-804).

Then followed lengthy interviews for the information of the trustee as to the condition of the accounts, assets, and liabilities (804).

On September 6, 1907, Mr. Nutter went to the office of P. Lennox & Co. Before entering he met Patrick Lennox and he asked him how things were getting along, and Mr. Nutter said all right (804). This was the second and last time (805) that Mr. Nutter ever saw Patrick Lennox. Mr. Nutter learned that the books had not been balanced since 1902 and did not cover many outside business transactions and were meager (293, 804).

The employees of the audit company called to Mr. Nutter's attention two checks for \$5,000 each, apparently drawn on September 3 to pay notes, and that no notes to be paid on that day could be found (804).

On September 7, 1907, Mr. Brandeis, Mr. Nutter, and Mr. Lennox had an interview in which Mr. Nutter asked Mr. Lennox what had become of these two checks for \$5,000 each, drawn on September 3 (804). Mr. Lennox said finally that he had the money in the safe of another man in Lynn (804). He then agreed to bring the money to the assignee, and did so on September 9. Nothing by way of lack of frankness to Mr. Brandeis and Mr. Nutter on Mr. Lennox's part had been noticed by them before this (805).

On September 9, it became apparent that an extension by the creditors was out of the question and the newspapers published a statement that the firm was financially embarrassed (314, 805, 1102). On that day Mr. Nutter told Mr. Lennox that hope of an extension



was out of the question and that it was necessary to record the assignment. Mr. Lennox assented to this (805) before it was recorded (1169).

On September 10, 1907, Mr. Nutter recorded the assignment.

On September 10, 1907, Mr. J. P. Leahy called upon Mr. Nutter and said that he acted for Mr. Patrick Lennox and from that time he continued to appear in that capacity in this matter, for two or more years (805, 806). This showed a clear understanding that Mr. Brandeis was not counsel for Patrick Lennox, and there was nothing to distinguish between Patrick and James T. in that respect.

Patrick Lennox took a position of opposition immediately (291), and it was this opposition more than anything done by James T. Lennox that rendered bankruptcy proceedings inevitable (1130, 1133, 1134).

On September 11, 1907, Mr. Stroock and Mr. Stein called on Mr. Brandeis and asked him to act particularly for Mr. Stein, and Mr. Brandeis told them that he could act for Mr. Stein only as for all the creditors equally and that he had no objection to their getting independent counsel to act for them specially (819, 820). They decided not to do so for the time being (823). This interview as a whole shows that there was a clear understanding that Mr. Brandeis was acting for the trustee for creditors only (815, 828, 1097).

From September 4, 1907, to September 18, 1907, the interviews between James T. Lennox and Mr. Brandeis and Mr. Nutter were almost daily. On September 18, Mr. Lennox declined to go on with the matter and help the assignee in discovering the assets and liabilities unless he received \$500 per week (1131, 1127). Mr. Nutter said that this sum was unreasonable and would not be approved by the creditors, but that he would pay him \$100 per week and perhaps could get approval of something better. This was declined by Mr. Lennox and he rendered little or no assistance to the assignee thereafter (828, 1127, 290).

Mr. Brandeis took substantially no active part in the matter after this, and Mr. Lennox did not consult him in any way or ask him to do anything (290). He last saw him in the matter on September 19, 1907 (828).

On October 4, 1907, Mr. Nutter submitted to Mr. Leahy a draft of his proposed report to creditors, and at Mr. Leahy's request he inserted in it a statement that for some years Patrick Lennox had not been active in the business, and made some other changes until they agreed upon the form of the report (825). No objection was made to the part of the report which stated that P. Lennox & Co. was composed of Patrick Lennox and James T. Lennox.

On October 24, 1907, Mr. Nutter learned for the first time, and from Mr. Leahy, that it was claimed that Patrick Lennox was not a Partner in P. Lennox & Co. (826). This put Mr. Nutter in a position where he was compelled by his duty as trustee to establish the fact of the partnership (831). Creditors to the amount of about \$380,000 had assented to the assignment (829).

During September and October, 1907, the investigations into the business were continued by Mr. Nutter, and he had several interviews with Mr. Leahy about possible terms of composition.

Mr. Nutter was unable to get from Mr. Lennox adequate information concerning the property covered by the assignment (303, 314),

and the creditors insisted that bankruptcy proceedings were necessary. Mr. Lennox was aware of this (832), and Mr. Nutter wrote him to this effect (1130). Mr. Lennox raised no objection to bankruptcy proceedings.

Mr. Nutter made repeated requests for information from Mr. Leahy as to the property of Patrick Lennox, but did not secure it (291, 1130). He became convinced that bankruptcy proceedings were necessary.

On October 31, 1907, Mr. Nutter, Mr. Herrick—representing Lee Higginson & Co., large creditors—and Mr. Leahy had a conversation at which it was stated by Mr. Nutter that bankruptcy proceedings seemed inevitable (829). He reported this to James T. Lennox by letter on November 9, 1907 (1130), and informed him that, under the circumstances, if a composition was to be effected it would necessitate bankruptcy (1130).

On November 11, 1907, Mr. Nutter issued a report to the creditors, stating that the estate could be administered in bankruptcy better than under the assignment (830).

Under the Massachusetts law, a voluntary assignee has no power to compel the assignor to submit to an examination as to the property covered by the assignment.

Between November 13, 1907, and January 4, 1908, several petitions in bankruptcy were filed on behalf of different creditors. The one on which Brandeis, Dunbar & Nutter appeared was brought first and by Allen Lane & Co. and other creditors (830). No compensation was paid by these (836, 847) creditors.

Mr. Lennox says that Mr. Nutter told him that he was assignee for the benefit of his creditors and not his counsel. Mr. Nutter told Mr. Lennox that he had better get independent counsel (836, 1126). This was prior to October 21, as Mr. Nutter saw him last on October 21 (290, 836, 1132).

On November 18, 1907, Mr. Sherman L. Whipple began to act as counsel for James T. Lennox and continued to do so for two years or more (290). He promptly saw Mr. Brandeis and told him that Mr. Lennox claimed that Mr. Brandeis had undertaken to act as his counsel. Mr. Brandeis at once told him the facts (289).

In the bankruptcy proceedings an answer was filed alleging on behalf of Patrick Lennox that he was not a partner in P. Lennox & Co. and that the assignment had been obtained by fraud (834). The manifest duty of the trustees was to maintain the integrity of the assignment and the existence of the partnership which had made it.

No evidence was offered in support of the allegation that the execution of the assignment had been obtained by fraud.

Mr. Lennox said that his only criticism of Mr. Brandeis or of Mr. Nutter was that Mr. Nutter would not pay him at the rate of \$500 per week (828, 1131).

The stenographer's transcript of the interview defining Mr. Brandeis's relation to the matter was offered in evidence in the hearings in bankruptcy (1164).

The case was heard before a referee in bankruptcy, who found that the partnership existed (847). This was followed by a trial before a jury, at which the court directed a verdict (1167), and then the case was taken by Patrick Lennox to the circuit court of appeals, without success (847).

Mr. Nutter, Mr. Herrick, and Mr. Hall became trustees in bankruptcy (830, 1170). The administration as assignee and trustee took four years (1144).

Counsel for Mr. Lennox and the trustees negotiated for a composition offer and finally one was made by which the firm creditors received 40 per cent and the individual creditors 100 per cent, and the bankruptcy was closed (839).

Neither Mr. Brandeis nor Mr. Nutter ever deviated from the course which Mr. Brandeis outlined as the only one upon which he would act in the matter, that of trustee for the benefit of all the creditors alike, and of counsel for the trustee. Only the surplus, if any, was to go to the debtor. All the steps taken were necessary to protect the creditors and were taken in performance of the duty incurred. No compensation was received from any source, except out of the trust fund (847, 1145).

No retainer or other payment for services was ever made to Mr. Brandeis or his firm by Patrick Lennox or James T. Lennox, Weil, Farrell & Co., or any other creditors (315, 847, 1113, 1145).

When the assignment was made there was no reason to suppose that there was the slightest conflict of interests between the debtor and the creditor (289, 312). It was understood that Mr. Brandeis was to act as counsel for the trustee. In that sense he was to act for the creditors and for the debtors in common (289, 312) to the point where either had any interests adverse to those of the trustee. The trustee and his counsel and the debtors had the common moral and legal duty of discovering, disclosing and getting into the possession of the trustee all the property. They must perform that duty. When the debtors unexpectedly failed (303, 1134) to perform this duty, their conduct necessitated legal proceedings. They, and not the trustee or his counsel, were the ones who acted adversely to the common understanding on which the matter had been undertaken (289). Only that adverse action made the bankruptcy proceedings necessary (289, 834, 1130). The trustee and his counsel were not relieved (299, 300) from performing their affirmative moral and legal duty by the fact that the debtors then took an adverse position, contrary to the understanding upon which the assignment was made. If the debtors withheld property, the assignee must take action to get it. If the debtors would not disclose their property, the assignee must take action to discover it. The examinations of James T. Lennox were in pursuance of the duty of the trustees to ascertain about the property of the debtors (820, 822, 823, 1007, 1170). This was the only action taken. No unwarranted feeling of embarrassment or taste (296) could justify the assignee or his counsel in neglecting the performance of this duty (290, 834).

When criminal proceedings were instituted against Mr. Lennox, the assignee and his counsel were under no duty to prosecute. They were asked to do so and declined (297, 304, 305, 837, 1145, 1170).

Mr. Whipple, who was his adversary, saw clearly that Mr. Brandeis's conduct was upright throughout (299).

Neither Mr. Brandeis nor Mr. Nutter declined to act for Mr. Lennox so far as it was consistent with the duty of a trustee for creditors (1131), and Mr. Lennox makes no criticism of either, except that Mr. Nutter would not pay him a salary of \$500 per week (1132).

The events in this case were due entirely to the fact that the debtors went back on the plan to which they agreed and under which the matter was taken up, namely, to devote their property fully and without hesitation to the payment of their debts. They were never deserted in any way. When they refused their assistance and one of them denied a partnership which unquestionably existed and failed to turn over assets and charged fraud of which there was no evidence whatever, they were deserting, and it would have been dishonorable in the trustee and his firm to assist in the attempt or to fail to take all necessary steps to secure the performance of the trust. Such a course would have been inexcusable and the one pursued was the only possible one. The debtors were fully informed of everything and were never refused any assistance consistent with the trust. The course pursued by Mr. Brandeis and his firm was consistent and honorable throughout. No better one can be suggested (833). With Lennox's knowledge and consent Mr. Nutter became assignee. It is inconceivable that Mr. Brandeis would thereafter desert his partner.

#### GLAVIS APPEARANCE.

It is charged that Mr. Brandeis was guilty of unprofessional conduct in appearing for Louis R. Glavis at the expense of Collier's Weekly, and concealing the source of his compensation from the select committee engaged in the investigation of the Department of the Interior and of the Bureau of Forestry. (Senate 719, 61st Cong., 3d sess., 1072.)

On August 18, 1909, Louis R. Glavis, then Chief of Field Division of the General Land Office, made a report to the President setting out facts which, if true, indicated that Secretary Ballinger was not a fit official for his high position. On September 13, 1909, the President rendered a decision exonerating Mr. Ballinger and authorizing the dismissal of Mr. Glavis, which immediately followed. On September 20, 1909, Mr. Glavis wrote the President of his intention to make public the charges leading to what he believed was his unwarranted dismissal. (Investigation, 888.) On November 13, 1909, the charges were published in Collier's Weekly (330). On January 19, 1910, the resolution was passed by Congress for the investigation. This resolution contained a provision that "Any official or ex-official of the Department of the Interior, or of the Bureau of Forestry in the Department of Agriculture, whose official conduct is in question, may appear and be heard before the said joint committee or any subcommittee thereof, in person or by counsel" (988).

Collier's Weekly having taken the legal and moral responsibility of presenting Mr. Glavis's charges to the country, felt it imperative to see that all proper steps were taken to have these charges verified before the committee (453-460; Sullivan, 325-335, 385). Collier's accordingly asked Mr. Brandeis to act for Glavis (455) and undertook to pay him therefor, and subsequently did pay him. No pretense was made that Mr. Brandeis was acting as unpaid counsel or for the public, and it was probably assumed by the committee that he was to be paid (994) and that Glavis was not in a position to pay for five months of continuous work by a man of Mr. Brandeis's standing and ability. (Senator Fletcher of that committee, 994.)

It was thought by Collier's Weekly that it was not seemly to attempt to get the credit of conducting the investigation (455), but no attempt whatever was made by anyone to conceal the fact that Mr. Brandeis was to be paid by Collier's (330, 332, 455). It was freely talked about (332, 455). It was known to members of the Interior Department who were in opposition (455). When occasion arose, the fact that Collier's Weekly was paying Mr. Brandeis was referred to in the paper itself (706).

Mr. Brandeis's efforts in the case were directed toward establishing the truth of the Glavis charges. He made no effort to have his own position or any belief that he was acting merely as a friend give any added weight to these efforts; and no occasion arose on which there would have been any propriety in his parading the fact that some one other than Glavis was the source of his compensation. That fact was assumed generally. If it were improper to give or to take compensation for such services except from the party of record, no poor man could ever have competent counsel in any extensive proceedings. These investigations are not social functions, but serious affairs. The truth is the goal to be attained. The facts are the same no matter who may have paid the lawyers. The committee did not ask Mr. Brandeis who was paying his fee, because then it made no difference. The fact that during the trial Mr. Finney, of the Interior Department, knew that Mr. Brandeis was employed by Mr. Hapgood, of Collier's (455), seems to me to demonstrate that those interested knew the situation then as well as they do now. This incident has nothing in it detrimental to the nominee.

#### MR. THORNE'S OPPOSITION.

Mr. Brandeis was employed to represent the Interstate Commerce Commission in the Five Per Cent Advance Rate case of 1913, and worked in the matter for about a year. His letter of employment was as follows:

We are of course aware of the fact that the carriers will not fail fully to present their side of the case, and the commission has felt that every effort should be made in the public interest adequately to present the other side. Would you care to undertake that burden? As you are already aware, in a number of cases of large importance and wide interest special counsel have been retained by the commission. As a matter of fact that has not been their real relation in these controversies. They have been retained by the commission not as advocates or to support any special theory of the issues involved, but as a means by which the commission might be advised of all the facts and not have to decide the issue upon a record made up largely in one interest. It is with this general thought in mind that the commission has reached the conclusion that in the Rate Advance case special counsel should be retained, and I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record, without advocating any particular theory for its disposition. In making this last observation you will of course understand that you will be expected to emphasize any aspect of the case which in your judgment, after an examination of the whole situation, may require emphasis. The commission, however, wishes to avoid a record based solely on a particular view or theory.

His duties were (1) to get before the commission those facts omitted by the carriers which might help the other side (2) to see that all sides and angles of the case were presented and (3) to emphasize any aspect of the case which in his "judgment" required it (8).

Mr. Thorne was employed by a number of railroad or public utilities commissions of several States and by organizations of shippers, some having general and some special and peculiar interests (7, 48, 53, 90).

Mr. Brandeis acted for the commission and not as a partisan (78, 87). He collected (76), formulated, and presented his evidence through the employees of the commission (51), and by the examination or cross-examination of the railroad employees and their witnesses (79) and not in connection with Mr. Thorne or any other counsel for particular interests (82).

Mr. Thorne prepared and presented his evidence in his own way "independently," as the witness puts it (80, 82).

The other attorneys for the railroads and for the shippers did the same.

The hearings for the reception of evidence began in October or November, 1913 (80), and closed on April 7, 1914, and the case was then set for the filing of briefs and the beginning of arguments on April 27, 1914 (15).

Counsel separated and prepared their briefs and arguments without conference or communication with each other concerning them (17, 50, 61, 82).

On April 27, 1914, they gathered, the briefs were filed, and it was arranged that the shippers' counsel should close their arguments first, with Mr. Thorne as the last, then Mr. Brandeis, and then counsel for the railroads.

On April 27 or 28 (76) Mr. Thorne asked Mr. Carmalt, the examiner attached to Commissioner Harlan's office and now chief examiner for the commission, what Mr. Brandeis's position in argument would be, and Mr. Carmalt told Mr. Thorne that Mr. Brandeis "would take the position that the net operating income of these carriers was not adequate, with especial stress on the lines in Central Freight Association territory, but that he would take the further position that the methods which the carriers had pursued to obtain greater revenues, namely, a horizontal increase of 5 per cent, was not the proper method of increasing their revenues" (19, 76, 81, 83, 84). Mr. Thorne also asked Mr. Brandeis on that day and received substantially the same information as to his position (19).

This brief was understood to take substantially the same position (20, 61).

It was two or three days later, on April 30, that Mr. Thorne began his argument.

He was followed by Mr. Brandeis, who opened by saying that he had reached the following conclusion:

First, that on the whole the net income, the net operating revenues of the carriers in official classification territory are smaller than is consistent with their assured prosperity and the welfare of the community, and that this is notably true of the C. F. A. lines, and it is true practically as to other lines also, because of the C. F. A. scale. In view of this, it is desirable that steps should be taken as promptly as reasonably may be to increase those net revenues.

Secondly, that the method proposed by the carriers for increasing these net revenues is essentially unsound; that it is, except as to a small part of the tariffs that have been submitted, entirely too low, and would, if approved, involve the exceeding of the powers vested by Congress in this commission; and as to that small part of the tariffs as to which it would be legal to approve them, it would be extremely unwise, both for the carriers and for the commission, to grant that approval.

Third, that there is nothing in the conditions of the carriers which should prevent the adoption of those methods of increasing their revenues which are conformable to

and in accordance with their interests and that of the community, and that there exists, as has been indicated on this record, adequate means of increasing those revenues without resort to the unsound, largely illegal, and undesirable method of the horizontal increase (33).

Mr. Brandeis had developed in evidence with great diligence and skill the facts (77) which might bear adversely (84) on the railroads. The evidence as a whole had convinced him of the soundness of the conclusions stated. He would have been derelict in his duty to the commission employing him if he had concealed this from his employers (62, 63, 64, 66, 68, 84, 92). His conclusions should be those which he could advise the commission to write into an opinion. They could accept or reject his advice, but were employing him for such help as he could give (63, 71).

On the merits of his conclusion, the difference between Mr. Thorne and him appears to be that Mr. Thorne grouped (32) the net revenues of a whole body of carriers and struck an average which was, of course, not available to the many carriers who were below that average and some of them below zero, whereas Mr. Brandeis stated these revenues in detail in his brief (p. 55) and classified them into four classes—(1) above 12 per cent, (2) 6 to 12 per cent, (3) 0 to 6 per cent, and (4) below 0 (988).

Rates fixed by the average of revenues derived from different and not comparable services, would not save the community (66) from receiverships over those roads performing a necessary service and having too small net revenues or none at all (988).

Counsel for shippers and their clients recognized the correctness of Mr. Brandeis's position (14, 88, 89).

Mr. Brandeis opposed the increase and filed an elaborate brief (11, 89), and argued in opposition, taking the position that even if the "net revenues" of some of the railroads were inadequate the rates sought to be raised did "yield an adequate return to the common carriers, the railroads operation in official classification territory" for the services rendered, so that the first question laid down by the commission (12-13) should be answers in the affirmative.

Mr. Brandeis's remark as to the surplus was elicited by Mr. Thorne's inquiry and was not a part of his argument (32). It is to be read on the light of his argument that rates were not to be fixed by reference to surplus earnings but that if the rates were fixed at such an amount that railroads properly managed had an adequate return and no more, any excess produced by extra skill and diligence should not be taken from them, by adopting a fixed limit to allowable earnings. He desired to increase the incentive for greater efficiency (31).

The increase in rates sought by the carriers was denied on the grounds urged by Mr. Brandeis (36).

Later, in the light of the new conditions created by the European war, a part of the increase sought was granted, against his opposition (36).

Mr. Brandeis performed his duty fully and with due regard for all parties and counsel interested, and for the commission which retained him as their counsel.

No complaint has been made by the commission, nor by any member of it, that I am aware of. Suppose Mr. Brandeis had taken the opposite view and had "decided" every point according to the view of Mr. Thorne, would he then have considered such a course wrong?

The fact that the commission adopted Mr. Brandeis's view forces the conclusion that if Mr. Brandeis was culpable so is the commission. If he, as their attorney, advised them to do wrong and they did it, we must conclude that they indorsed the wrong or are incompetent, a conclusion which would shock the judgment of the country. In my opinion this charge is without any merit whatever.

FREDERICK M. KERBY.

It is suggested, rather than charged, that it was improper for Mr. Brandeis to receive information from Mr. Kerby because he was in the employ of Mr. Ballinger (650). This refers to the Ballinger case.

Kerby was in the employ of the United States, was paid by the United States, and his duty of fidelity was as much to the United States as to his immediate superior. It is not necessary to go further on that point. He was a stenographer assigned to work under Mr. Ballinger when he was the Secretary of the Interior.

On August 18, 1909, Louis R. Glavis, then Chief of Field Division of the General Land Office, made a report to the President setting out facts which, if true, indicated that Secretary Ballinger was not a fit person for his high position. On September 13, 1909, the President rendered a decision exonerating Mr. Ballinger and authorizing the dismissal of Mr. Glavis, which immediately followed.

On January 19, 1910, a joint resolution was passed for an investigation of the Department of the Interior and of the Bureau of Forestry.

In the investigation which followed, the main issue was whether Mr. Ballinger or Mr. Glavis was wrong. Upon this issue Glavis suffered from the inevitable presumption that the President's decision was right. It therefore became important to show the fact that the decision had been drafted, in substantial respects, in Mr. Ballinger's office after an *ex parte* presentment of the facts by Mr. Ballinger, and had been rendered in an unwarranted reliance upon him and his subordinates, and that Mr. Ballinger and his subordinates were disingenuous in their statements.

In September, 1909, Oscar Lawler, Assistant Attorney General, assigned to the Interior Department, drafted a letter of decision for the President to sign, condemning Glavis and exonerating Mr. Ballinger. He dictated this in part to Kerby.

Shortly after the publication of the President's letter exonerating Mr. Ballinger, Hugh A. Brown, a friend of Kerby's, asked him what he thought of the President's letter, and Kerby informed him that it was practically written in the Secretary's office (988; S. Doc. 719, 61st Cong., 3d sess., pp. 4395-4489, 4398). In response to a similar inquiry, Kerby also told another acquaintance, Arnold, who represented the United Press (4398). These communications were supposed to be confidential (4398). At some time Brown told Mr. Garfield that the draft had been prepared in the Secretary's office. Brown had been private secretary to Mr. Garfield when he was Secretary of the Interior.

In February, 1910, Brown told Kerby that Mr. Garfield knew that the letter had been prepared in the Secretary's office, and that he might be called as a witness (665). Kerby, apparently recognizing



the right of the investigating committee to have the truth and his own duty to disclose it, feared that he might be dismissed as Glavis had been, and he therefore sought an interview with Mr. Garfield to see if there was not some way in which the information could be brought out without his being called. (S. Doc. 719, 4397, 4441.) Brown undertook to arrange this meeting for a particular evening, between February 10 and 15, at the house of Mr. Gifford Pinchot, where Mr. Garfield was staying. Kerby, supposing Brown had made this appointment, called on Mr. Garfield (665) and told him of his desire to avoid being called if the fact could be brought out in some other way. Mr. Garfield asked him to talk with Mr. Brandeis, who was at the house at the time, and he did so. This was the first time that he had met Mr. Brandeis (666).

After this conference Mr. Brandeis made several calls for papers, evidently seeking production of the Lawler memorandum (648).

On or about May 8, 1910, Arnold introduced Robert S. Wilson, of the Newspaper Enterprise Association, to Kerby (S. Doc., 4400) and Wilson sought to get a statement of the facts for publication and assured Kerby of a position if he was dismissed; but Kerby declined to give it as he had a family dependent upon him (S. Doc., 4413). Later, on reading Mr. Ballinger's testimony (S. Doc., 4415, 4456), and seeing that the memorandum was not produced in response to the calls (S. Doc., 4419, 4443, 4449, 4460), and being sure that it was known that there was a copy of the letter in the department (S. Doc., 4419, 4429, 4448, 4452), and observing that a majority of the committee had declined (S. Doc., 4493) to call on the President for the production of the draft letter, he decided to publish the facts and so to force the production of the letter (649).

He had an interview with Mr. Brandeis at Wilson's office, in which Mr. Brandeis told him that he thought it was impossible for him to get the facts before the committee, but declined to advise him whether or not to publish the story (651).

This was the second and last time that Mr. Brandeis ever talked with him (S. Doc., 4448). In neither interview did Mr. Brandeis urge him to make the disclosure or offer him any inducement (S. Doc., 4431).

Kerby decided to publish the facts and they appeared in the newspapers of May 14. On May 17, at the suggestion of the chairman of the committee, Kerby was called as a witness and examined by Mr. Ballinger's counsel and by Mr. Brandeis and testified in detail as to these facts (650, 667). There are no limits to suspicion, but there are rules of evidence, as well as just ways for determining the probatory effect of facts. Shall we ignore the proved facts and indulge a suspicion in order to condemn the nominee? I can not. The facts in this matter leave no stain upon Mr. Brandeis.

#### FAIR TRADE LEAGUE.

No charge has been suggested against Mr. Brandeis in connection with this league.

Mr. Brandeis has spoken in support of the price-maintenance principle and of the provisions therefor embodied in the Stevens bill. This has been without compensation and because of his belief in the principle underlying the bill (812, 976).

The evidence under this head was brought out at the instance of the committee for the same reason as stated under the heading "Dingley bill wool duty."

#### EQUITABLE POLICYHOLDERS' PROTECTIVE COMMITTEE.

It is charged that Mr. Brandeis, or his firm, was paid for his services as counsel for this protective committee, and subsequently accepted employment by the Equitable Life Assurance Society in a manner that was unprofessional (886).

From 1901 to the present time, Brandeis, Dunbar & Nutter have acted from time to time in different matters for the Equitable Life Assurance Society when that society had occasion to employ counsel in Boston (690).

In 1905 strife developed between the different officers of this society; and thereupon a number of large policyholders formed a protective committee to investigate and determine what, in their opinion, should be done for the best interests of the society, and Mr. Brandeis acted as unpaid counsel for this committee. He and the committee criticized the methods which had been pursued by the officers (669) and made many suggestions for improving the methods of this and other life insurance companies (689, 696). The committee continued as long as its services were of value (698). One of its members became a director (971). The committee was not designed to be antagonistic to the society, but for its protection and benefit (972). Mr. Brandeis rendered faithful, diligent, and satisfactory services to the committee (971). His employment by the company was that of attorney in specific cases, having nothing to do with the company's management. He had no retainer, but was paid for what he did. I can see nothing to criticize in his conduct.

#### NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. MERGER.

It is charged that Mr. Brandeis was in some way responsible for the destruction of the financial condition of the New York, New Haven & Hartford Railroad Co (123). This charge is without foundation (271).

In 1907 and thereafter Mr. Brandeis did a large amount of public-spirited work in attempting to prevent the acquisition or retention by the New York, New Haven & Hartford Railroad Co. of the control of the Boston & Maine Railroad Co. and other transportation facilities in New England, tending, as he then claimed, to produce artificial transportation monopoly and suppression of normal railroad competition (809).

He investigated and made public the financial condition of this railroad (271, 618, 627). He was bitterly assailed for this (618, 620, 627, 642). The correctness of his position is now generally conceded (271, 638, 639, 645, 641). This extensive work was done without compensation (991).

#### WILLIAM F. FITZGERALD.

It was insinuated that Mr. Brandeis counseled an improper method for obtaining additional finances for the Old Dominion Copper Mining & Smelting Co., improperly concealed a report from stockholders, and

went over to interests adverse to those of the Old Dominion Copper Mining & Smelting Co. because of the money to be obtained thereby (1225).

These insinuations were so entirely unwarranted that the entire committee thought it unnecessary to hear the facts in reply (1251).

From January 9, 1902, to April 2, 1902, Mr. Brandeis acted for Mr. Fitzgerald, Mr. Smith, and others in obtaining sufficient proxies to elect a new board of directors for the Old Dominion Copper Mining & Smelting Co. in place of the board favorable to Albert S. Bigelow, then president of the company (1246) (1228). On April 2, 1902, the new board was elected and Charles Sumner Smith was by it elected president of the company, and has remained the president ever since. The board of directors selected Mr. Brandeis as the counsel for the company, and he never was counsel for Mr. Fitzgerald in this matter thereafter (1247) (1231). He instituted suits against Mr. Bigelow and Mr. Lewisohn to discover alleged promoters' profits taken by them in the organization of the company in 1895 (1247).

In the late summer of 1903 it became apparent that the company must have additional funds. A plan was formed to secure these funds by having the company issue bonds to the extent of \$750,000 with a bonus of stock to a securities company, the stock of which should be subscribed for by all of the stockholders in the Old Dominion Copper Mining & Smelting Co. Mr. Fitzgerald testified that this plan failed because only about one-third of the stockholders availed themselves of the opportunity to subscribe (1248).

At this time, in October, 1903, negotiations were taken up between the company and men connected with Phelps, Dodge & Co., owners of the stock of the United Globe mines, a corporation owning mines adjacent to those of the Old Dominion Copper Mining & Smelting Co.

These negotiations finally resulted in a plan for the formation of a holding company, organized under the laws of the State of Maine, called the Old Dominion Co. This company was to acquire the stock of the United Globe mines and the stock of such of the stockholders in the Old Dominion Copper Mining & Smelting Co. as wished to exchange their shares for shares in the new company.

This plan involved the consideration of the advantages which would result from this connection with the United Globe mines, in the value of the mines and the known financial strength and mining ability of Phelps, Dodge & Co.

The entire board of directors of the Old Dominion Copper Mining & Smelting Co., including a partner of Mr. Fitzgerald, was favorable to the plan. Mr. Fitzgerald desired to have a receiver appointed for the company and Mr. Smith opposed this (1250, 1282).

Mr. Smith requested a mining engineer to examine the United Globe mines (1281). He made an examination involving only a few hours (1281) and made a report to the effect that the United Globe mines property did not have a value as high relatively to those of the Old Dominion Copper Mining & Smelting Co. as the proportion of stock which it was proposed should go to the stockholders of the United Globe mines had to the value of the stock which it was proposed should be received by the stockholders in the Old Dominion Copper Mining & Smelting Co. Mr. Smith did not feel that the report of this cursory examination was of any value and believed that the connection with the stockholders in the United Globe mines had a

value greatly in excess of what was to be gained from the acquisition of the properties which they owned (1281). Mr. Smith announced that the engineer's report was at the company's office, and many stockholders did come in and see the report and were given an explanation of its value (1281). He believed that the report alone, if published, would be misleading rather than helpful to stockholders (1281, 1283). He accordingly did not publish this report. In this he acted on his own initiative, and Mr. Brandeis was not responsible for its not being published (1282). At the end of October Mr. Fitzgerald requested the publication of the report (1252). It was published on November 11, 1903 (1254).

The agreement under which the Maine company was formed was made after this, and the holders of a very large proportion of the stock in the Old Dominion Copper Mining & Smelting Co. exchanged their stock, and the enterprise has since been very successful and to the advantage of the stockholders who exchanged their stock and to those who did not (1284, 1236).

As a part of this new organization, it was provided that whatever the Maine company received in dividends from the New Jersey company, resulting from the suits against Bigelow and Lewisohn, and certain other assets amounting to about \$94,000, should be paid over by the Maine company to trustees for the benefit of the existing stockholders in the Old Dominion Copper Mining & Smelting Co., who transferred their stock to the Maine company, or to those persons to whom they might transfer their rights, the trustees to receive as compensation an amount not exceeding 5 per cent of the funds handled (1280). The trustees selected were Mr. Smith and Mr. Hoar, who was then a partner in Brandeis, Dunbar & Nutter. The purpose of this arrangement was to have these proceeds go to the benefit of the existing stockholders in the New Jersey company, and not go to those stockholders in the Maine company who had become such by reason of having been stockholders in the United Globe mines (1272).

At this time the litigation against Mr. Bigelow had been going on for more than a year without any specific arrangement having been made as to the amount to be charged by Brandeis, Dunbar & Nutter as counsel. This situation continued for three years more, and until the suits had passed the stages of demurrers and the greater part of the evidence in support of them had been taken.

In the fall of 1906, four years after the suit was started, the board of directors desired to have some specific agreement made as to the liability which they were incurring for the services of counsel. This resulted in an arrangement that the payments on account of these should be not exceeding 6 per cent on the fund of \$94,000 (1275)—that is, \$5,500 a year (1279)—and that in addition there should be paid as a balance for these services an amount not exceeding 10 per cent of the judgment or settlement obtained in the cases (1276). This amount was suggested by Mr. Smith (1275) and approved by the board of directors, who believed that this would be a reasonable arrangement (1276). The company considered a settlement at one time of a hundred thousand dollars (1285), subsequently five hundred thousand dollars, and then a million dollars, but ultimately about two million dollars was obtained (1276). The litigation incident to this claim or growing out of it has been conducted during about 13 years in about 15 courts (1256). The payments which

have been made have been based upon the agreements, and everything has apparently been entirely satisfactory to all parties (1274).

There is no evidence whatever that Mr. Brandeis did anything but what was entirely commendable. Mr. Fitzgerald, notwithstanding the questions urging to the contrary, said that he was not prepared to charge any irregularity in the matter (1245) and that he did not mean in any way, shape, or manner to suggest that Mr. Brandeis was working for the Phelps-Dodge interest or conspiring to do anything in that way, because he knew he was not (1246), and that to his mind Mr. Brandeis advised him that his best interests would be to go into the reorganization (1239).

#### EDWARD R. WARREN.

The charge, if any, to which Mr. Warren's testimony related was that Mr. Brandeis had misrepresented to a committee of the Massachusetts Legislature the attitude of the State board of trade concerning certain legislation as to the Boston Consolidated Gas Co.

This company, or the interests which were consolidated into it, were urging to be allowed a capitalization of \$24,000,000 (808). The Public Franchise League opposed this (1309). Mr. Warren was the chairman of the executive committee of this league which consisted of 12 or 14 men, and Mr. Brandeis acted as its counsel. The State board of trade cooperated in this opposition (1309).

At or shortly before the beginning of May, 1905, it became evident that the legislation which the Public Franchise League wanted, namely, a general law concerning the consolidation of gas companies, could not be passed (1315), and that the company could be persuaded to accept a capitalization of \$15,124,600 (1315) (808). This was somewhat higher than the Public Franchise League desired.

Mr. Brandeis urged upon the league that they should support the bill for the capitalization of \$15,124,600, and the executive committee voted unanimously, with the exception of Mr. Warren, to support this bill (1309). Mr. Sprague, representing the State board of trade, did not concur in this position (1309).

The charge made against Mr. Brandeis was that he represented to the committee of the legislature that the State board of trade did concur. No evidence in support of any such charge has been offered, and on the contrary, it appears that Mr. Brandeis informed the legislative committee that the State board of trade could not favor this compromise bill, and was opposed to it (1315). This fact was reported to Mr. Warren and to Mr. Sprague the same day (1315).

These are all the charges and embrace every matter as to which the evidence related except the opinions evidence.

I yield to none in respect for that "greatest judicial tribunal," our Supreme Court. Its importance in our scheme of government is manifest; and that the appointing power has always looked upon the selection of the justices of that court as involving a sacred duty is proved by the great ability and probity of certainly a very large majority of its membership at all times in our history. Nevertheless, its membership must be recruited from the people, and anyone measuring up to the required standard in ability would be suspected at once of a lack of initiative and personal force if he had not made some enemies and had not engendered an opposition, which could, if it felt so inclined, make a plausible fight against his confirmation. The

nominee whose name is before us now has been an active, forceful quantity in his city, State, and country. He has enjoyed a large, lucrative law practice almost ever since he was admitted to the bar. He has been for many years a member of the bar of the Supreme Court, a member of the American Bar Association, and of similar associations in his home State; a member of the board of visitors of Harvard Law School; a writer upon law as well as general subjects; a public speaker and lecturer with pronounced views, and with exceptional powers for impressing those views upon the public; the unpaid counsel of labor organizations, protective associations, and other civic bodies; the paid counsel in many of the most important legal contests before the courts and other public tribunals; an arbitrator in strikes and labor disputes; and the special counsel of the Interstate Commerce Commission.

Such a man, so prominently active in public and private life and at the period when the construction of the Sherman law, the awakening of the States to their duty concerning industrial combinations and the determination of the dividing line between State and National power, is bound to have been engaged in contests before the courts and before legislative bodies more or less bitter; and he would indeed be a human prodigy if he had not aroused some bitter antagonisms. It is in evidence that there was a systematic campaign of advertisement to injure him in the estimation of the public. I must, therefore, either decide that the active, earnest, fearless man who might, in the discharge of his duties in his own way, arouse such opposition, is forever debarred from judicial appointment, or else inquire into the grounds of the opposition and determine whether or not such opposition is based upon good and sufficient reasons or otherwise. Anyone who reads the protests made against Mr. Brandeis must come to the conclusion that the opinion expressed by those who undertake to give his reputation is based upon some one or the other of the charges heretofore discussed at length, and since I find that no fault can be attributed to the nominee as to any of those charges in the light of the facts brought before us, then I am bound to say that those who express the adverse opinion have been erroneously influenced by the advertising campaign carried on against him.

To give an idea of the character of the campaign which has been waged against Mr. Brandeis, I clip from the Wall Street Journal, of March 27, 1916, under the heading, "Sacredness in confidences," the following:

No lawyer can faithfully serve a client without gaining knowledge of that client's peculiarities, strength in parts and weakness in parts, which would make him doubly valuable as a counsel to his opponent.

When an attorney has accepted the confidence and compensation of one side and then gone over to the compensation and confidences of the other side, and the President and Senate of the United States place him upon the Supreme Bench of the land, a new era has dawned for the priest, the physician, and the advocate, or there is condemnation for both bench and bar, for a Senate of lawyers, for a President, and for a party and its politics.

When James Lennox in the presence of several witnesses unbosomed himself to his attorney and later found his \$10,000 credited against the \$48,000 received from the other side with the denial that his attorney was ever his attorney, what can we think of honor at the bar?

But when that attorney goes to the United States Supreme Bench, what can the world say of honor within the United States with both bench and bar?

Brandeis at the bar may represent individual wrongs, but Brandeis on the bench puts the United States before the world below even the present standards of his Teutonic ancestors.

If the writer of the above will read the record of the evidence taken before the subcommittee I do not doubt that he will be ashamed of having penned it. It is absolutely false to say or intimate that Mr. Lennox ever paid Mr. Brandeis a cent, much less \$10,000, for any services to be performed by the latter, or for any other purpose, and Mr. Lennox never made any such claim; and yet the average person would infer from the above editorial that Mr. Lennox had paid Mr. Brandeis as a retainer the sum of \$10,000.

The testimony of Mr. Barron, to which I have already referred, shows that he fostered an advertising campaign against Mr. Brandeis, and yet when he was brought before the committee and asked for the facts upon which his campaign was based, and after the committee had examined every witness suggested by him, obtainable, we find that there is nothing in the conduct of Mr. Brandeis to warrant Mr. Barron's opinion, and absolutely nothing to reflect upon Mr. Brandeis's character as a man or a lawyer. It is suggested in the brief of counsel of the protestants that if a doubt shall be raised concerning the ethical conduct of the nominee, he should not be placed upon the Supreme Court. If that theory shall obtain, then it is possible, by a campaign of slander, to bar the best men and the best lawyers in the country from the judicial office. I am not willing to indorse a campaign of slander, whether it was intended to be slander or not, when promulgated.

If after full investigation I find, as I do, that Mr. Brandeis is not guilty of the things charged against him by his enemies, then it is my duty to say so and to give him the benefit of a pure life and his upright conduct, regardless of the slander.

Judicial temperament is a thing of which it is not for man to judge except by actual experience on the bench. No one can tell whether a great lawyer will be a great judge until he has been tried. It seems to me that there is more in the life of Mr. Brandeis as shown by this record to incline one to the belief that he has the qualities of a good judge than there is to the contrary. It is remarkable that friend and foe alike speak of his great ability as a lawyer. The late Chief Justice Fuller advised one seeking a lawyer in the East, as follows: "Go to Boston and see Mr. Louis D. Brandeis, as I consider him the ablest man who has ever appeared before the Supreme Court of the United States. He is also absolutely fearless in the discharge of his duties."

It is impossible to give in detail the testimonials to Mr. Brandeis's fitness and his high character, and it is unfortunate that there are so many of these coming from every part of the United States, from lawyers, judges, college professors, business men, labor leaders, and people in all walks of life, that it would be almost impossible to print them. I do not doubt that if one takes the pains to look at the protests upon the one side and the indorsements upon the other, in the light of the evidence in this case upon both, my conclusions will be found by him to be reasonable and fair. I therefore voted with the majority of the subcommittee to recommend confirmation.

W. E. CHILTON.

I am authorized by Senator Fletcher to say that he concurs in the above.

W. E. C.

## NOMINATION OF LOUIS D. BRANDEIS.

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Mr. WALSH, from the subcommittee of the Committee on the Judiciary, submitted the following

### VIEWS.

[To accompany the nomination of Louis D. Brandeis.]

To the COMMITTEE ON THE JUDICIARY,  
*United States Senate.*

The unusually grave character of the duty with which this committee has been charged quite fully justifies, if it does not require, from each member thereof an expression of the course of thought through which he has arrived at the conclusion in consequence of which he assumes the responsibility for the recommendation he makes.

The testimony taken by the committee is voluminous. In the infinite multiplicity of the duties devolving upon Senators it is quite vain to hope that any considerable number, except those upon whom the burden of investigation has been directly imposed, will read it all or read any of it.

Outside of the Senate opinion will be based in very small part upon anything more trustworthy than a résumé of the evidence collected by the committee. I assume the task of reviewing it with a just sense, as I hope, of the importance of the office to which it relates in our scheme of Government. The interest in the nomination in respect to which we are called upon to act, manifested alike by the citizen in the humble walks of life and by those whose influence is nation wide reveals the universality of the conviction that in large measure the liberties and the destiny of the American people have been intrusted to the great court to fill a vacancy in which the President has named Louis D. Brandeis.

It so happens that the nominee has awakened unrelenting enmities and fast friendships. He is the object of unrestrained admiration on the one hand and of fierce vindictiveness on the other. The qualities that evoke the just praises of those who believe in him need not engage our attention. It is conceded on all hands that in intellectual equipment and professional attainments he easily measures up to all requirements—indeed, in that respect his qualifications are superb.



His character is assailed, however, as too perverse to justify the Senate in advising or consenting to his appointment. His private life appears to be blameless. It is not charged that he is corrupt, at least by any one not moved by reckless malevolence. The accusations, if they may be so called, relate entirely to alleged disregard of ethical standards in his professional relations. Singularly enough, there is very little opportunity for dispute in respect to the facts constituting the incidents which the committee deemed worthy of its notice.

There is wide divergence of view touching the significance of the facts disclosed. Interpreted by those bent on finding something to criticize or ready by prepossession to attribute discreditable motives to Mr. Brandeis, they assume a sinister aspect. Men of the highest character, frank admirers of that gentleman, who participated in the transactions in respect to which he is denounced, insist that his conduct was either irreproachable or altogether honorable. It is particularly important in this quite curious situation, in order to form a just estimate of the conduct and character of the nominee, to guard against the insidious influence of detraction and calumny.

Long before his name came to the Senate for the high office of associate justice of the Supreme Court efforts were made through the public press and by means of circulars widely distributed to bring him into disfavor and disrepute. Not unlikely some impression such as it was hoped might be conveyed may remain on the minds of some Senators who fell under the influence of these and like attacks. Moreover, it is scarcely to be expected that one unacquainted with local conditions, who has not followed with scrupulous care the inquiry as it proceeded, would be wholly uninfluenced by the fact that a considerable number of the members of the bar of Boston, the home of the nominee, have protested against the confirmation of his nomination and have organized to oppose it, and that some of them have testified that he is regarded in that community as untrustworthy. These conditions make it imperative, before attempting to survey the particular transactions to which reference is made as justifying the ill opinion thus expressed, to have in mind some incidents in the career of Mr. Brandeis which may have predisposed those by whom it is entertained.

It is clear that he has been a vigorous, aggressive, relentless antagonist in all his legal battles. Moreover, he has been successful. In illustration: One of the lawsuits in connection with which some misconduct was charged is referred to as the "Old Dominion case." The nature of the dereliction with which he was accused need not be adverted to. It was utterly puerile, the testimony drawing from a member of the committee (Senator Cummins) a public declaration that it was valueless. Mr. Brandeis had been employed to assist in securing stock or proxies sufficient to take the control of the Old Dominion Copper Mining Co. from the hands of one Bigelow and associates, who had promoted the company. The effort was successful and a new board elected, through which suits were brought in the name of the company by Brandeis as its attorney to recover of Bigelow the value of a large block of the stock of the company which it was averred they had fraudulently converted. The litigation was bitterly contested in the courts of Massachusetts, New York, and New Jersey, repeatedly reaching the reviewing courts and even-

tually the Supreme Court of the United States. Judgment was finally rendered against Bigelow for two and a quarter million dollars, on which, after a contest lasting 14 years, payment of upwards of \$2,000,000 has been enforced. It may well be assumed that any man of whom a judgment in excess of \$2,000,000 can be collected is one whose influence is felt even in a city the size of Boston, at least in the banking center and in financial circles. Those who know something of the development of the copper-mining industry with which Boston has been long and creditably identified are aware of how commanding that influence was. It is quite reasonable to suppose that his social standing was in keeping with his great wealth and the magnitude of the enterprises with which he was associated. It was bad enough to be required to give up \$2,000,000, but to be branded as having misappropriated so much of the property of the stockholders who had been induced to come into a corporation organized by him was a grievance that very naturally rankled. It is altogether probable that Mr. Bigelow would not express himself in complimentary terms concerning Mr. Brandeis if he were moved to speak of him.

No wretch e'er felt the halter draw  
With good opinion of the law,

and few with good opinion of the lawyer. So it is likely that all Mr. Bigelow's friends, or most of them, share the ill opinion which he may be excused for holding of Mr. Brandeis, if he does cherish such.

The part that Brandeis had in exposing the malefactors of great wealth who, in insolent contempt of the law, monopolized the transportation facilities of New England, merging them in the New York, New Haven & Hartford system, and milking the properties in the process is more generally known. These were the very high priests in the temple of Mammon. Boston was the New England as New York was the western terminus of that system. The fight was waged before the Legislature of Massachusetts and the railroad commission of that State long before it engaged the attention of the National authorities. Among many public-spirited citizens who, singly and through local organizations, attempted to prevent the absorption of the Boston & Maine by the New Haven, Brandeis was conspicuous. Before legislative committees and officials of the State government, in public addresses he declaimed against the consolidation. He not only attacked through pamphlet and the public press the design to impose a transportation monopoly on that highly industrial region, but he investigated and laid bare the financial condition of the company, in consequence of which its stock, a few years later, dropped spectacularly, and the system was brought to the verge of bankruptcy. He asserted that its securities were not a safe or proper investment for savings banks, by which they were held in great quantities. The timid deprecated his assaults and the guilty assailed him with unrestrained venom. He was placarded through paid advertisements in the press as a public enemy.

It will be remembered that the merger was accomplished, that afterwards suit was brought to dissolve under the Sherman Act, which was soon dismissed; that subsequently, pursuant to a resolution of the Senate, the affairs of the New York, New Haven & Hartford were investigated by the Interstate Commerce Commission; that the hear-

ing revealed a state of affairs at which the country stood aghast; that a new dissolution suit was instituted, resulting in a "consent" decree; that the directors participating in the merger transactions were indicted and upon trial some were acquitted and as to others the jury disagreed. We need not concern ourselves as to whether Mr. Brandeis was right or was wrong in the warfare he thus waged. It may be that the absorption of the New England lines was a benevolent assimilation and not a criminal conspiracy. It may be that his elaborate figures touching the financial condition of the New Haven were not fully and altogether justified by the investigation conducted six or seven years afterwards by the Interstate Commerce Commission. I am endeavoring now merely to bring to mind some idea of the atmosphere breathed by those who speak in disparagement of him. To enforce this point I quote from testimony elicited on cross-examination of two of them—both very honorable gentlemen—Mr. Storey and Mr. Hutchins, of the Boston bar. In the testimony of the former will be found the following:

Senator WALSH. Is it your opinion that the conduct on the part of Mr. Brandeis was calculated unjustly to injure the New Haven road?

Mr. STOREY. I do not know that I can or ought to express any opinion on the subject. The feeling was that there were better ways of conducting that matter than were adopted. The undoubted result was apparent. The truth, of course, is that the New Haven Railroad under that administration was spending money recklessly, incurring liabilities recklessly, and doing various things which were most unfortunate for the property. There is no question that Mr. Brandeis called the attention of the public to those facts: but for some reason or other I think they did not make the impression on the public that they would have made if they had come from another source.

Senator WALSH. But his communications through the public press at that time did direct the public mind to what afterwards was disclosed to be a rather questionable system of operation in finance?

Mr. STOREY. I have no doubt that is correct. (Hearings, 270-271.)

Senator WALSH. I judge from what you say that people associated with that organization exercise a very powerful influence, socially, politically, and financially, in your community?

Mr. STOREY. They did, certainly at one time. (Hearings, 272.)

Mr. Hutchins being on the stand, the following colloquy took place:

Mr. ANDERSON. Mr. Hutchins, I should like to ask you a few questions. Mr. Joseph B. Warner was chairman of the Commission of Commerce and Industry, if I have the name correctly, which wrote a report about 1908 which was quite a factor in the New Haven fight, was it not?

Mr. HUTCHINS. I think so; yes.

Mr. ANDERSON. And there was a pretty sharp controversy at that time relative to the statistics and figures which Mr. Warner and Mr. Charles F. Adams, jr.—I have forgotten the other members of the commission—had accepted and published as accurate, and what Mr. Brandeis alleged were the actual facts?

Mr. HUTCHINS. Yes.

Mr. ANDERSON. And the subsequent history of the New Haven tended, at least, in the minds of a great many, to show that those gentlemen were led into grave error. Is not that so?

Mr. HUTCHINS. I really can not speak of the merits of that controversy; that is, I mean as to the report of the commission, etc.

Mr. ANDERSON. You did not go into that in any detail?

Mr. HUTCHINS. I did not go into that.

Mr. ANDERSON. But there was a good deal of bad blood engendered in and about Boston in that New Haven fight, was there not?

Mr. HUTCHINS. Yes; a good deal.

Mr. ANDERSON. A lot of people maintained for years that there was nothing but a wicked drive being made on the New Haven, and that everybody who criticized the New Haven was a destroyer of properties and values, and the facts as they later appeared did not justify that criticism. Did they?

Mr. HUTCHINS. I do not know about the justification of the criticisms, but there was certainly a great deal of sentiment of the kind that you express in your question.

Mr. ANDERSON. Assuming that the Interstate Commerce Commission investigation developed something approaching the truth, the atmosphere against Mr. Brandeis in 1908 and 1909 was an atmosphere of harsh and unwarranted criticism, was it not?

Mr. HUTCHINS. The criticism was harsh. Whether it was unwarranted or not I do not feel competent to judge.

It is quite proper to say here that no one save one Barron, a newspaper publisher, shown to have acted as publicity agent for the New Haven road in the course of the long struggle being outlined, ventured to question the purity of the motives which actuated Mr. Brandeis therein, however the soundness of his judgment as to the methods he pursued or the conclusions he drew might be questioned. No one has suggested that he had any private interest to subserve, and he received no compensation from any source.

One circumstance in this connection would not be mentioned but that it helps to a correct resolution of his conduct in the Lennox case, hereafter to be noticed.

Those who think of him as grasping and avaricious, if there are any such, may find one hue in his acts in that case; those who believe him a man of high ideals or as not afflicted with an inordinate love of money may give them quite a different color. Not only was he paid nothing for the herculean labors he performed in the New Haven fight, involving him in a torrent of abuse and villification, but he declined employment by parties holding Boston & Maine securities in a large amount who, like him, were opposing the merger, preferring, as the subject was one of public concern, to be untrammelled. And then, because he had deprived his firm of a lucrative engagement, he paid into it \$25,000, a sacrifice that was not so great as it might seem to some in view of the volume of business the firm was doing and the fees it was accustomed to receive. (Hearings, 991, 995.)

Seven members participated in its earnings and it employed a house full of clerks, stenographers, accountants, and other like subordinates. The record discloses another instance in which he pursued, in substance, the same course.

Just how far the animosities engendered by the New Haven fight, considering the infinite ramifications of its interests and of those vitally concerned in effecting its purposes and in concealing the unstable character of its finances, may have influenced the minds of those about Boston who protest against this appointment is a matter of speculation. Doubtless most of the wealth and culture of the community were arrayed on its side.

While it stands out most prominently in the public mind because of the vast interests involved and the standing in the financial world of the chief figures in it, the New Haven fight was not singular. Perhaps less is known yet much has been told of his warfare on the United Shoe Machinery Co., a corporation with a capital stock of \$25,000,000, with headquarters at Boston. When in 1910, four years after he ceased to be a director of that company, it was about to acquire control of the Thomas G. Plant Co., then threatening to become a formidable rival, he declared that the penitentiary would yawn for any one concerned in the consolidation. Indictments were found against the officers of that company, the Department of Justice being satisfied that there was sufficient foundation for a prose-

cution, though the indictments were afterwards quashed. A deep-seated hatred was aroused against him on account of his criticisms of that company that is still virulent, and not the less so that Congress, by the agitation, was moved to insert provisions in the Clayton law and the Trade Commission law which it is hoped may correct some of the evils most intimately associated in the public mind with the operations of that company.

The Consolidated Gas Co. of Boston, whose career is not as sweet smelling as might be wished, found Brandeis a serious obstacle in the way of getting everything it wanted from the Massachusetts Legislature. It was the central figure in another protracted fight which has vexed the Boston people. Indeed, the public-service corporations of that city exhibited such a disposition to lay hands on anything they could secure that the people organized themselves to resist their exactions and propensities. The Public Franchise League came into existence to protect the public. Brandeis was a prominent member of the organization, as was George W. Anderson, afterwards a member of the Massachusetts Utilities Commission and at present United States district attorney for the district comprising that State.

It is not without excuse, whatever reason they may have, that some Boston people do not like Mr. Brandeis. A number of the members of the bar of that city sent a protest against his confirmation, reciting that his reputation among the lawyers of that city is that he is untrustworthy. One of the signers wrote a letter setting out why in his opinion such a view was entertained and giving his own judgment of the merits and demerits of Mr. Brandeis's character. It is so judicial in spirit, so keenly analytic, that I venture here to insert it.

BOSTON, MASS., *February 24, 1916.*

GEORGE W. ANDERSON, Esq.,  
85 Devonshire Street, Boston, Mass.

MY DEAR ANDERSON: You have asked me to write you a letter giving my views on Mr. Brandeis and on his appointment to the Supreme Court and on the way in which that appointment would be viewed by the Boston Bar. I am not seeking to be involved in this controversy any further than necessary, but I do not feel that anyone asked for such an opinion has a right to refuse.

First, then, so far as ability goes, there can be no question as to Mr. Brandeis's professional standing. He is universally acknowledged to be one of the ablest men at our bar, both in point of legal learning and of effectiveness, and if the question was of intellectual ability alone, his appointment would be generally approved.

There is, however, equally little question that he is not generally popular with the bar, and that among a considerable proportion of the lawyers here he has the reputation of not being a man with whom it is pleasant to deal in business matters, and one who is unscrupulous in regard to his professional conduct. Just how far there is any solid foundation for such a reputation it is extremely difficult to say. So far as specific charges go, all of any consequence of which I have ever heard have been or will be brought to the attention of the committee at Washington, and of those it is unnecessary that I should speak, especially as I can add nothing of my personal knowledge.

The general reputation remains, and it is certainly one which is worthy of consideration, in estimating the fitness of an appointment to the bench. Indeed, I think in the existing state of the feeling here that no one can be fairly criticised for opposing the appointment. Many of his opponents are my personal friends and I understand and respect their point of view, though I believe they are mistaken. At the same time, I believe that the reputation to which I have referred is not founded so much on anything that Mr. Brandeis has done as it is on other causes. He is a radical and has spent a large part, not only of his public, but of his professional career, in attacking established institutions, and this alone would, in my judgement, account for a very large part of his unpopularity. It would be difficult, if not impossible for a radical to be generally popular with Boston lawyers, or to escape severe adverse criticism of his motives and conduct. Certainly I have never heard of anybody, from Joseph Story down, who has ever succeeded in doing so. The fact, too, that Mr.

Brandeis has been the object of constant attack, and in particular of a very skillful and long continued press campaign, engineered on behalf of the New Haven management by Mr. C. W. Barron, has probably increased the feeling against him, for such advertising inevitably produces effect, by mere repetition, upon people who are not conscious of its influence. When you add to this that Mr. Brandeis is an outsider, successful, and a Jew, you have, I think, sufficiently explained most of the feeling against him.

Undoubtedly he is a merciless antagonist, fighting his cases up to the limit, and with great technicality, and taking every advantage which the law allows him, without perhaps always a keen regard for fair play. So far as I am aware, nothing more than this could be fairly considered as proved against him. On the other hand, there is, except among a comparatively small number of people, a general recognition that Mr. Brandeis has rendered public service to the community of extraordinary value, and that in doing so he has been actuated by disinterested motives. He lives with great simplicity, and has throughout his career devoted to unpaid public work a very large proportion of his time and energy. With the opportunities that have been open to him, he could, by following more conservative courses, have been a much richer man than he is to-day. I do not think it can fairly be doubted that he deliberately chose to serve the public rather than to devote himself entirely to making money, nor do I think it can be fairly questioned that in doing this he was actuated by high motives.

Throughout his career he has shown unusual interest in and sympathy for those classes in the community upon whom economic conditions bear hardly, and has devoted a large part of his time and energy to measures which he believed would help them. The work which he has done along these lines has been sanely planned and carefully worked out, and he has acquired in doing it an unusual grasp of those social and economic conditions which underlie many of the most important questions with which the Supreme Court will have to deal. I believe he will bring to the consideration of these problems not only great legal acumen and deep sympathetic insight, but a power of careful analysis and an ability to see facts and law in their larger relations, which will make him a great judge. Once on the bench the things which have injuriously affected his standing at the bar will cease to be important and his strong qualities, his great ability, his knowledge not only of law but of economics and social conditions, and his capacity for taking a broad judicial view of any questions to which he applies his mind, will be of inestimable value.

Of his fundamental honesty of purpose, and his deep moral enthusiasm, I feel absolutely sure. His qualifications for the position of Supreme Court Judge far outweigh, in my judgment, anything which can fairly be urged against him. For these reasons I sincerely hope his nomination will be confirmed.

I ought, perhaps, to add that I have never had any legal or other business either with Mr. Brandeis or against him, and have no reason to expect that I ever will have such business. I have known him for many years, but never intimately, and I entirely disagree with his political opinions. My knowledge of him is simply that which I have gained in 20 years' practice at the same bar. I have no reason to desire his appointment, except the interest which every citizen, and particularly every lawyer, has, to wish that the best possible man should be selected. It is only because I know no one in this community whom I consider so well fitted for the position that I hope he will be confirmed.

Yours, sincerely,

ARTHUR D. HILL.

(Hearings, 619, 620.)

(N. B.—May, 1916.—Mr. Hill was not one of the protestants, as erroneously stated above. He ardently supported Mr. Brandeis.—T. J. W.)

In the light afforded by what has been said, I proceed to consider the several matters in connection with which the nominee is said to have shown himself unworthy of the high honor with which the President desires to invest him. I pass directly to the two apparently deemed most grave—the Lennox case and the Warren case. Astonishing as it may seem, the leading counsel in both of these cases, representing the parties whose cause Brandeis is charged with abandoning, completely exonerates him from any misconduct worse than an error of judgment. In respect to the Lennox case, Mr. Sherman L. Whipple, who, as the attorney for James T. Lennox, developed in certain proceedings in bankruptcy the exact facts touching the relations which Mr. Brandeis had sustained to his client (the stenographic

notes of the interviews out of which the alleged employment rose having been read), asserted that in his opinion Brandeis acted from most honorable motives and with a high ideal of the duty of a lawyer in the premises. Later his exact language will be quoted.

#### THE LENNOX CASE.

The business of the firm of Lennox & Co., tanners, had been developed by Patrick Lennox, who, at the time of the occurrences to be narrated, was nearly or quite 80 years of age. For 10 years his son James T. Lennox, the other member of the firm, had managed the business. Its transactions amounted to about \$1,000,000 a year. The firm property and private assets of the partners exceeded that sum. In the panicky season of 1907 the firm became embarrassed, and a creditor, one Stein, was called to Boston from New York by James T. Lennox. With his lawyer, one Stroock, he met Lennox, who, in detailing his situation, disclosed that if not actually insolvent he was dangerously near being so. Stroock suggested that he, Lennox, ought to consult a lawyer, and, mentioning Brandeis, Lennox assented. The three waited on Brandeis, under whose questioning, which was exhaustive, going in detail into assets and liabilities, the condition referred to was more clearly exhibited. Stein was friendly. Another creditor participated to some extent in the conferences and it was determined that a general assignment without preferences should be made and that Brandeis should try to work out some general agreement among the creditors—for an extension or a composition, as the progress of negotiations might suggest. This was done, one of Brandeis's partners, George R. Nutter, being named as assignee. It was canvassed in the course of the conference whether Brandeis should become attorney for Stein or for Lennox, but it was agreed eventually that the plan could be worked out most effectively if Brandeis did not represent Stein or any other creditor and that he would represent Mr. Lennox in the manner stated. Stroock having asked Brandeis whether, in view of relations which his firm had sustained to a creditor, Weil, Farrel & Co., he could act for Lennox, the latter said:

Yes; I think I could. The position I should take if I remained in the case for Lennox would be to give everybody, to the best of my ability, a square deal. (Hearings, 792.)

And he continued:

I should, if I acted for Mr. Lennox, see that he got his legal rights: no more, no less. (Hearings, 793.)

Again, he said:

I should feel if I were acting for Mr. Lennox as trustee that it was the duty of the trustee to see that everybody got his legal rights as nearly as we could make it. (Id.)

And then Lennox, referring to some comment by Stroock, remarked:

You are speaking now of Mr. Brandeis acting as my counsel?

Whereupon Brandeis interjected:

Not altogether as your counsel, but as trustee of your property. (Hearings, 795.)

It is plain from the foregoing that Brandeis proposed (whatever may have been the understanding of Lennox) that the latter and his father should turn over to him, Brandeis, all their property, he to

deal with the situation with justice to everybody and in the hope of making an adjustment that would be satisfactory to all concerned, or, in the event that such a solution could not be reached, to apply the assets to the liquidation of the indebtedness.

The assignment was made in pursuance of that plan, and Brandeis immediately got into communication with the other creditors with a view to carrying it out. When the assignee went to take possession under the assignment, he learned, through accountants who had been directed to examine the books, that James T. Lennox had but recently cashed checks to the amount of \$10,000, the avails of which did not appear. Inquiry revealed that he had the cash in his possession. On being questioned in the present hearing, he stated that he needed the money. The assignee required him to surrender it, which he did, though reluctantly. A short time after a controversy arose between him and the assignee concerning the compensation he was to receive for assistance which he was rendering pursuant to request in attempting to straighten out the tangled affair—the books being fragmentary and the business having been run without much system. He demanded \$500 a week; the assignee refused to allow him more than \$100. Meanwhile, on September 10, the assignment having been made on the 5th and recorded on the 9th, one J. P. Leahy, of Lynn, where the Lennoxes lived, called upon Mr. Nutter, representing, as his counsel, Patrick Lennox. He conferred with Nutter and forwarded his work for some time, but toward the close of October Patrick Lennox, through Leahy, set up the claim that he was not a member of the firm of Lennox & Co. and that he had never signed the instrument making Nutter assignee or that his signature had been obtained fraudulently or without full understanding of its purport. When Nutter refused to hire James T. Lennox at \$500 a week he ceased to assist actively in carrying out the trust, and much difficulty was encountered on account of his indifference or apathy and the claims of the elder Lennox referred to. Meanwhile the creditor, Weil, Farrel & Co., was threatening to proceed criminally against James T. Lennox on an alleged fraudulent statement of his financial condition and sought to employ the Brandeis firm to conduct the prosecution, but they declined. An indictment was afterwards returned. The execution of the trust with which Brandeis had charged himself through the assignment proving impracticable, on account of the attitude of the Lennoxes, it was resolved to see it carried out through bankruptcy proceedings, to which various creditors had recourse. Several petitions were filed, one by the Brandeis firm. An adjudication went, the court holding that the assignment was duly made and constituted an act of bankruptcy. In the original conference it had been mentioned that it was such and would require an adjudication, if asked, but the hope was expressed that the creditors would assent to the assignment. (Hearings, 788.)

The thing worked out as was originally contemplated. A composition was effected under which the individual debts of the partners were paid in full and the firm creditors got 40 cents on the dollar. There is no doubt that the making of the assignment, though an act of bankruptcy, was the wise course to pursue under the circumstances. None of the parties involved are making any complaint. Mr. Leahy was not called to express any complaint on behalf of the elder Lennox



and it will be borne in mind that an organization of protestants was represented at the hearing by counsel who undertook to present to the committee the names of any witnesses his clients deemed it advisable to call. James T. Lennox came in response to a subpoena, but was excused on his request on saying that he could add nothing to what had been said by Mr. Stroock and Mr. Whipple. He was later called, at the instance of a member of the committee, but he showed no hostility to Mr. Brandeis. Whipple was employed to resist the bankruptcy proceedings. He is the head of a leading firm of Boston lawyers, said without dispute to be one of the ablest trial lawyers in New England, an enviable reputation which those who heard him testify will agree he doubtless fully merits. When the story was told him of how the Lennoxes employed Brandeis in their troubles only to find that his firm had filed a petition in bankruptcy against them, he did the manly and fraternal thing. He called on Mr. Brandeis. Let him tell the story of the interview. Introducing the subject which gave rise to his call he said:

They say that you advised an assignment to your partner, Mr. Nutter, and took all of Mr. Lennox's property, and that you now claim that you are not and never have been his counsel, and I thought, Mr. Brandeis, it would be better for me to come right to you and talk over a situation which seemed to me to be serious, because if you did agree with the Lennoxes that you would act as their counsel, and now are acting in a position hostile to them, through this assignment, you will agree with me that a rather serious situation is presented. (P. 287.)

The witness continues:

He said, "Of course it would be," or he said, in substance, "Of course, that would be a serious situation, but it is not the situation at all; I did not agree to act for Mr. Lennox when he came to me. When a man is bankrupt and can not pay his debts, Mr. Whipple, he is a trustee for his creditors; he has no individual interest; he finds himself with a trust, imposed upon him by law, to see that all his property is distributed honestly and fairly and equitably among all his creditors, and he has no further interest in the matter. Such was Mr. Lennox's situation when he came to me, and he consulted me merely as the trustee for his creditors, as to how best to discharge that trust, and I advised him in that way. I did not intend to act personally for Mr. Lennox, nor did I agree to." "Yes," I said, "but you advised him to make the assignment. For whom were you counsel when you advised him to do that, if not for the Lennoxes?" He said, "I should say that I was counsel for the situation." I said, "Yes; but you advised an assignment of all his property, so that your firm became possessed of it, because Mr. Nutter was your partner." He said, "Yes; and I knew no one better in the city of Boston than my partner, Mr. Nutter, to execute such a trust as that. He stands high; he has everybody's confidence, and that is why I advised it." I said, "I must say, Mr. Brandeis, it looks to me very much, according to your principles, as if when a man was bankrupt and went to a lawyer, and the lawyer advises him to make an assignment for the benefit of his creditors, he assigns his lawyer with it, very much in the way a covenant runs with land." He said, "Mr. Whipple, I think that is a very unkind and very ungenerous statement for you to make. It impugns my motives, and I can only assure you that I had no such motive in doing it. I was merely occupying myself with seeing that this property, which was brought into my office in this way, was equitably and fairly distributed among the creditors, and I was looking after the interests of everyone; I was looking after any interest that Mr. Lennox had, if any, if anything should be left after the settlement with his creditors, but, in the first place, looking after the interests of the creditors." (Hearings, pp. 287-288.)

The impressions Mr. Whipple took away are expressed by him as follows:

MR. WHIPPLE. You see, my belief was, at the time, that there was a misunderstanding. My belief was at the time, and is now, that Mr. Brandeis was misunderstood. That is, I preferred then, and prefer now, not on account of any personal friendship or feeling, but my view was that there was a misunderstanding. I think Mr. Brandeis was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he

unconsciously overlooked the more human aspect of it, which would perhaps have appeared to another; but here was a man confronted with perplexities and charges and troubles, who wanted his personal and individual care and attention. But I think Mr. Brandeis looked upon it as a problem of distribution.

He did not view Mr. Lennox, with his difficulties and troubles and desires, in quite the human way that certainly some lawyers would. He took a broader view, as it seemed to me, that he was charged with the duty and responsibility, not merely of looking to Mr. Lennox or to Mr. Lennox alone, but that he owed a larger and broader duty to all the interests involved. Now, I felt then, and I feel now, that that was a mistake, but it does not mean, to my mind, that Mr. Brandeis was culpable; that he deserted a client; that he neglected a duty to a client, because, as it seemed to me—and I will say it frankly—at first he was going with the property and had a more lucrative job. I was convinced from my talk with Mr. Brandeis and from my knowledge of his character, that the mercenary motive did not exist; that the thought of deserting Mr. Lennox's case and interest did not enter his head. I thought then, and I think now, that he made a mistake in this, at least, that he did not make it clear, so that a layman would understand just what he was talking about. When a lawyer talks to a business man about being charged with the responsibility of an equitable division of the estate among all who may be interested, such talk, I think, goes right over the head of the ordinary business man who does not understand clearly the fiduciary duties of a man in that position, and who does not understand the clear and fine definition of the fiduciary duty in its different aspects.

To this he added:

I was convinced of his sincerity, his devotion to a thought, and an idea with regard to the administration of this estate, which was credible—credible because it is true that a man when he is a bankrupt is the trustee for his creditors, and he has no right to try to keep money from his creditors or to prevent an equitable and fair distribution or to prefer them. That is true. It is a high and proper ideal of practice. A lawyer who is charged with the duty of advising under those circumstances has a duty not only to the debtor who comes to him but to every creditor, and he must and ought to be scrupulous in his discharge of it. But, of course, his scrupulous discharge of that duty to all the others must not permit him to neglect his duty to the one who needs his help the most. (Hearings, 300-301.)

These observations prompt me to inquire what a man wants with an attorney anyway after he has made a general assignment for the benefit of his creditors? All his property is gone and there is nothing an attorney can do except to see that the trust is managed to the best possible advantage, so that the property will go as far as may be to discharge the claims of creditors or possibly satisfy them in full, leaving a residue which becomes his again. The best thing a lawyer can do for him, the only thing he can do, is to become attorney for his assignee and aid him in administering the trust. There can be no diversity of interest so long as the assignor purposes and seeks to have the trust carried out. He needs no lawyer except the attorney for the assignee. It is the universal practice, accordingly, for the attorney who draws the deed of assignment to become counsel to the assignee. Lennox must have known—it was impossible that he could fail to know—that the Brandeis firm would become the attorneys for Nutter, the assignee. He could not by any possibility have imagined that in a contest of any character arising between him and the assignee Mr. Brandeis or the Brandeis firm was going to counsel him, except as both he and Nutter were counseled; or that if, perchance, any difference between him and the assignee found its way into court, Brandeis or his firm was to represent him as against the assignee, Nutter. He never paid the Brandeis firm anything and no charge was ever made against him. When he put himself in an attitude of hostility to Nutter he knew that he could not count on Mr. Brandeis as his personal legal representative. It is an embarrassment to a lawyer who has drawn an assignment and

become attorney for the assignee to make a choice should a disagreement unhappily arise between him and the assignor. He could, perhaps, not be blamed whichever way he determined lay his duty. But as Mr. Brandeis's partner was the assignee there was no choice open to him. Nor was there, apparently, any choice open to the assignee, when it became evident to creditors that the trust was not being carried out and could not be carried out in view of the hostile claims being made, but to resort to the bankruptcy court or watch the assets pass out of his control through proceedings in that court instituted by creditors who would not sit idly by while the assignors were perhaps getting away with the property. Mr. Brandeis apparently resolved that an obligation rested upon him to carry out the trust in the only way open to do so. Some may differ with him as to what ought to be done in a case so rare, but no one who does not view the proceedings with a jaundiced eye can doubt that he acted conscientiously in the course which was taken.

#### THE WARREN CASE.

On leaving college Brandeis formed a partnership with a classmate, one S. D. Warren, the son of a successful paper manufacturer, S. D. Warren, sr. After the youths had been in business in Boston under the firm name of Warren & Brandeis for about 10 years the elder Warren died, about 1888, leaving three other sons, Edward, Henry, and Fiske, a daughter, Cornelia, and a widow, their mother. The children, of whom S. D. was the eldest, had all reached their majority. The law firm had so successfully established itself by that time that Warren was drawing out of the business about \$10,000 a year. The property which had enriched the family was left by the will of Warren, sr., to his widow and children. Warren & Brandeis became the attorneys for the executors. It was the desire of all that the business be kept in the family, and yet Edward was in Europe most of the time, devoted to antiquarian research and the collection of antiquities; Henry was a student in feeble health, who died not many years after; Fiske was a youth without much experience. The ladies were cultured, but their capabilities in a business way had not been put to the test. It was in mind that those who undertook to run the business should assume the risk and that the other members of the family should be relieved of personal responsibility. It was planned that the property should be conveyed to trustees, and these trustees should lease the property to those who undertook to manage it. One Mason, a relative, had long been associated with the elder Warren in the business. He, S. D. Warren, and Fiske Warren took it over, the old firm name continuing. The mill property was conveyed to trustees, Mrs. Warren, S. D. Warren, and Mr. Mason, the deed reciting the trusts and authorizing the trustees to lease to a firm of which any of the trustees might be members. It was then leased to the new firm, which agreed to pay to the trustees 6 per cent on a valuation placed upon it and one-half the profits. The movable property appurtenant to the mills was taken over by the firm and the value of the respective shares credited on its books to each beneficiary. Substantially, the firm bought this property

and became indebted for it. S. D. Warren, who had given some attention to the business during the later years of his father's life severed his relations with the law firm, and thereafter devoted himself to the paper business, though the firm name of Warren & Brandeis was carried for a number of years thereafter.

The firm of which Mr. Brandeis was the head after the retirement of S. D. Warren became attorneys for the trustees and for the firm of S. D. Warren & Co., their fees being paid in part by each, respectively. Edward Warren was abroad when the instruments mentioned were prepared and the deeds had to be sent there to him for execution. With the letter went a list of the accompanying instruments, as follows:

1. Deed of Cumberland mills and other property, from the residuary devisees under father's will to John E. Warren.

2. Deed of Copsecook mill, same to same. The property covered by both these deeds will be conveyed by deed of even date to the trustees named in—

3. Declaration of trust by Susan C. Warren, Samuel D. Warren, and Mortimer B. Mason, of which I send you a copy.

4. Deed of Forest Paper Co. property to Louis D. Brandeis. This will be conveyed by him at once to the purchasers of the property, Mortimer B. Mason and Samuel D. Warren.

5. Bill of sale, residuary legatees, to new firm of S. D. Warren & Co.

6. Brief explanation of proposals, showing the reasons for the various transfers. (Hearings, 843.)

The letter, after giving directions concerning execution of the instruments, continued:

I do not send you at the moment detailed figures of the condition of the estate, such I have submitted to the other children, for two reasons, first, because I do not like to have them go out of my possession and run any chance of going astray, and, secondly, because I have found so much explanation necessary to their comprehension by the other children that I do not think you would understand them without explanation. All the others have been carefully into the matter and approve of the proposed arrangement; and I shall have to ask you to take my word for it so far as you do not understand it. When you return in the fall, I will go into all details to your satisfaction.

The upshot of the whole matter is that the Forest Paper Co. is sold to Mortimer and myself at what I think is a fair price for the one-half interest of the estate (viz, \$90,000), the other half being owned by George W. Hammond. The assets of the old firm of S. D. Warren & Co. are sold to the new firm at a fair valuation. The Cumberland and Copsecook mills and other real property in Maine are conveyed to the trustees for 33 years to be dealt with for the benefit of the residuary devisees in the proportions in which they are interested under the will. For the present the rental allowed to the firm of S. D. Warren & Co. for the use of these mills will be 6 per cent per annum on the value of the plants at any time plus 50 per cent of the net profits of these mills. This I think an extremely favorable arrangement for the devisees.

I should add, lest you get an inflated idea of your income, that the profits of last year (in which you had a larger interest than those of this) were larger by a considerable sum than they will be this year, or than they ever were before; 1888 was the high-water mark in profits.

Please execute these papers as soon as convenient and return them immediately on execution, care S. D. Warren & Co., 220 Devonshire Street, in a waterproof envelope clearly addressed.

Your affectionate brother,

SAMUEL D. WARREN.

(Hearings, 844.)

Edward did return in the fall, and came to this country at intervals thereafter. The liveliest affection had always, until differences unhappily afterwards arose, obtained among the various

members of the family. Even on the eve of starting suit against his brother S. D., in the year 1909, Edward wrote him as follows:

MY DEAR SAM: I have had to file the bill, because otherwise it would have been difficult to obtain a satisfactory before Monday next, but—

First. I hope that you will make me contented to withdraw it; and

Second. The phrases are such as in a legal document I have felt obliged to sign, but are very far from representing my feelings toward you aside from the business or my desire for unanimous fraternal procedure.

Let us try to agree; it would be much pleasanter.

Your affectionate brother,

E. P. WARREN.

BELLEVUE HOTEL, BOSTON,  
*December 13, 1909.*

(Hearings, p. 860.)

Annual statements were sent to all the beneficiaries and remittances or settlements made. In 1902, after the plan had worked without friction for 13 years, Edward exhibited some dissatisfaction. He employed a lawyer, one William Youngman, who, several years thereafter, brought a suit for Edward, asking that his brother S. D. be removed as trustee, for a decree annulling the lease, and for an accounting. Issue was joined. S. D. Warren was examined at length before a master, the examination being conducted by Sherman L. Whipple, heretofore referred to. S. D. Warren died before his examination was completed, and a settlement of the litigation was effected, under which the interest of Edward Warren was acquired. Mr. Moorfield Storey was employed by Fiske Warren and represented him in the litigation. Mr. Storey appeared before the committee as a protesting witness. He signed a remonstrance as an ex-president of the American Bar Association, appearing in the record. He appeared to tell that Brandeis had been employed to wreck the New England Railroad, to be hereafter referred to, and that the reputation he bore at the bar of Boston was not good. Asked about the Warren case, he said:

MR. STOREY. The position is this: When Mr. Samuel D. Warren, sr., was alive, he owned the mills and was the controlling partner in the firm. The firm sold the goods, and there was some arrangement between the firm and Mr. Mason, personally, for a division of the expenses and profits. When he died that situation existed and something had to be done in order to carry on the business, and an arrangement was made whereby the property formerly held by Mr. Warren, personally, was vested in trustees, and Mr. Samuel Warren took his father's place in the firm, and Mr. Fiske Warren was also in the firm, but with a smaller interest. Mr. Edward Warren was in Europe engaged in the study of arts and curiosities, and was not in active business.

The arrangement which was made seemed to me, as I examined it, a perfectly fair arrangement. It probably, in view of what happened afterwards, would have been better if Mr. Edward Warren had independent advisers to counsel him. But the thing was submitted to him and agreed to by him, and I saw nothing in the arrangement as to which he could complain. I sat through the trial which had begun, and Mr. Warren was on the stand, as I remember, about six weeks, and during that time was cross-examined by Mr. Whipple. There were about six weeks more, as I understand it. It looked as if the cross-examination might last longer, when Mr. Warren died. During the cross-examination nothing developed which reflected upon Mr. Samuel D. Warren in any way, or upon Mr. Brandeis.

As I say, I saw nothing in the case up to the time the case ended of which Mr. Warren could be in any way ashamed. It seemed to me he had treated his brother with great fairness. I should have done perhaps very much as Mr. Brandeis did if I had been in his place. It would have been a matter of caution, however, to have independent counsel, but apparently the family united—

MR. ANDERSON. Was there any more reason for suggesting independent counsel for Mr. Edward D. Warren than Mrs. Warren—I mean at the outset?

Mr. STOREY. I do not know that there was.

Mr. ANDERSON. Was there any more reason for suggesting separate counsel for Edward Warren than for Fiske Warren?

Mr. STOREY. They were all of age, and Fiske Warren, up to that time, had not been very active as a business man, any more than Edward Warren, but he was on the ground and was in a position to employ counsel. Mr. Edward Warren was on the other side of the water. At the time, as I say, there was nothing in the relations between the different members of the family to suggest that there was any divergence of interests, or any reason why they should not act harmoniously, as they did. (Hearings, 277, 278, 279.)

Perhaps that is all that need be said about the Warren case.

If Mr. Storey, with his opportunity to know the facts, and he was obliged to investigate them in order properly to advise his client, found nothing to criticize, the quest is not likely to yield much.

Mr. Hollis Bailey was associated with Youngman in the litigation. He is likewise an adverse witness.

The following indicates his view of Brandeis's wrongdoing:

Senator WALSH. So far as the Brandeis firm are concerned and Mr. Brandeis's connection with it, as I understand you, the complaint which you make against him is that this firm acted during this period at one and the same time for the lessors and for the lessees in these arrangements?

Mr. BAILEY. Yes; and that should rightly have suggested to him, when there were conflicting interests, that independent counsel would have been quite proper to act.

Senator WALSH. The point you make is that it was the duty of the Brandeis firm to have suggested to your client, as soon as differences arose, that he should get independent counsel?

Mr. BAILEY. Independent advice. (Hearings, 149.)

I think, further, that if Mr. Brandeis had properly considered the rights and interests of Mr. Edward Warren he would have said to him, "Your brother, Samuel, while he is trustee, is getting these very large sums for carrying on the business under the lease."

Senator WALSH. That is to say, that when the lease was made originally you think Mr. Brandeis should have advised Edward that he ought not to consent to that lease or enter into it because his brother, Samuel, was getting a better bargain than he ought to get?

Mr. BAILEY. Not to do it, in any event, without having the advice of independent counsel. Those are the main points. (Hearings, 150.)

But why should Brandeis advise Edward Warren that he ought to get independent counsel? Would not such a suggestion from him be an affront, and a perfectly gratuitous affront, to S. D. Warren, who might be presumed by any one knowing him and particularly by his law partner to give his brother such information as the conditions might seem to require? Edward was at the time 30 years of age—a graduate of Oxford. If Brandeis ought to have advised him to employ an independent lawyer certainly he owed the same duty to Mrs. Warren and to Cornelia and to Fiske and to Henry. It would be an absurdity as a business proposition to bring into a family settlement of that character a lawyer for every member or even one representing each diverse interest and there were at least three.

As to advising Edward when differences arose to get another lawyer, he forthwith employed Youngman and it was unnecessary to give him any advice on that point.

But it was suggested at the hearing, perhaps by a member of the committee, that when suit was begun against S. D. Warren, the Brandeis firm ought not to have acted for him because it had been attorney for Edward Warren in the transactions under investigation in that it had been attorney for the trustees to whom he stood in the relation of *cestui que trust*. That is a startling doctrine. Certainly Edward Warren had disclosed nothing to the firm, confidential or otherwise.

which could be used against him. The firm had learned nothing and could have learned nothing that each beneficiary was not entitled equally to know. Can it be that when the title of the trustee or his administration of the trust is attacked by one of the beneficiaries the attorney for the trustee can not represent him because, forsooth, the former has been drawing pay out of funds which belong equitably in part to the suing *cestui*? Is an attorney for a corporation precluded from defending its directors when assailed in court for maladministration? Is the attorney for an executor or administrator? The suggestion must have been made unreflectingly.

The suit was founded upon the supposition that the lease fell within that class of contracts which equity avoids, not because of any fraudulent purpose but because of a public policy springing from a desire to remove the temptation to defraud.

Here is what Mr. Whipple has to say of this affair:

The question was then whether all parties who were involved—all the beneficiaries—knew it and assented to it, fully advised and with their eyes open, and it was contended in behalf of Mr. Edward Warren, who was at the time abroad and whose information all came by correspondence, that he intrusted the whole matter to Mr. Brandeis and was not fully informed, so that that was the ground of the position which we took in the litigation and with reference to which my cross-examination of Mr. Samuel D. Warren proceeded; but Mr. Bailey, as I noticed by the public press, stated, in response to a question by one member of the committee, that he believed that Mr. Brandeis intentionally framed this lease and other papers so as to give Mr. Warren this opportunity to make private profit. That belief I do not share with Mr. Bailey. I cross-examined Mr. Warren at length, and I was then impressed, and so expressed myself, that the idea of defrauding his brother or the other members of his family, or securing a personal advantage to which he was not entitled, did not enter his head; that the entire transaction was free from any taint of dishonest motives or intentional fraud.

I had the feeling with regard to Mr. Brandeis somewhat like Mr. Storey has just expressed, that he was possibly careless in not making very, very clear to Mr. Edward Warren just the whole transaction and its possible effect upon his rights, but I felt at the time, and I feel now, that Mr. Brandeis, who has been the family counselor and been trusted for many years, thought that there was a perfect understanding and accord among all the members of the family; that Mr. Samuel D. Warren, who, by the death of his father, became the head of the family, should be charged with the responsibility of handling and operating this large property and should have what he could make out of it. Of course, if that was so, and all parties assented, there was no violation of trust; and there was no moral wrong. Therefore, I reached the conclusion that there was a legal wrong; that there was a violation of that principle of law with regard to trusts which I have just pointed out, but that there was no reprehensible motive to secure a personal advantage secretly or in any way like that. (Hearings, 283-284.)

Mr. Youngman, referred to, overwhelms Mr. Brandeis with accusations in connection with this case, but it may be said in charity that his employment by Barron to gather up the material for a newspaper campaign against Brandeis probably warped his judgment touching the acts of that gentleman.

#### THE BALLINGER INQUIRY.

The essential facts in reference to this matter are well known. Glavis, a subordinate in the Interior Department, had laid before President Taft charges affecting the administration of that department under Secretary Ballinger and had been dismissed from the service. It was claimed among other things, that by a laxity or liberality in the practice of the department, the Secretary was permitting the coal lands of Alaska to be fraudulently appropriated. Complicity in the general purpose or at least, toleration of it, was

understood by many to be implied. The incident intensified a suspicion of the Secretary entertained by the so-called "conservationists," headed by Gifford Pinchot, Chief Forester. Collier's Weekly, an advocate of the ideas of the "conservationists," printed the Glavis charges. A congressional investigation into the causes of the removal of Glavis was ordered. Collier's Weekly employed Brandeis to appear at the investigation. Upon consideration it was determined that he should appear for Glavis, their contributor, and not seek to introduce the paper as a party to the proceedings.

Glavis was presumably quite willing to have so able a lawyer as Mr. Brandeis. He announced to the committee that he appeared for Mr. Glavis, and as his attorney conducted the inquiry. Collier's paid him \$25,000 for his services, which extended over a period of 5 months. He is accused of unprofessional conduct in not announcing to the committee that he was employed and paid by Collier's.

It is asserted and not denied, that it was common knowledge at the time that he was employed by Collier's. He never was asked who hired him or by whom he was paid. The committee, perhaps, thought it quite immaterial. They could scarcely have believed that an impecunious Government clerk was feeing one of the first lawyers in the country.

Be that as it may, were it not for the views of some members of the committee, I should unhesitatingly declare the charge absurd. It presents the question of whether a lawyer may with propriety have his name entered in a cause as attorney for a party who pays him nothing under employment by another, but with the assent of the party he nominally represents. I assert that it is a practice of daily occurrence, not only tacitly approved but recognized by the courts. Can not a mother employ an attorney to defend her son charged with crime? Must he announce in entering his appearance who employed him and where he gets or expects to get his pay?

The stock association of my State frequently employs a lawyer to aid county attorneys in the prosecution of cattle-stealing cases. The local prosecutor is usually glad to have his assistance. Is he disqualified for judicial honors if he does not announce to the court that the State did not hire him and does not intend to pay him? I venture to assert that scarcely a term of the Supreme Court passes during which some lawyer does not have his appearance entered on the invitation, or by the assent of the counsel already of record, being employed by some one not a party to the suit, but who is interested in the principle involved. The court would stare at a lawyer who under such circumstances in beginning his argument, took its time to announce that he was not hired and did not expect pay from the party for whom he spoke.

If this is professional misconduct the bar needs regeneration.

Another charge in this connection is answered by the undisputed evidence of the record.

#### THE NEW ENGLAND CASE.

Barron told the committee that Hon. Moorfield Storey could tell that Brandeis had been employed in 1902 to wreck the New England Railroad. It was the conclusion of that gentleman that he had been so employed. The facts were that Brandeis had been retained by



one William Kelly, a reputable lawyer of New York City, now a supreme court justice, to bring suits against the directors of the New England road, charging misconduct on their part, to restrain the payment of dividends, alleged to be illegal because there were no profits from which to pay them, and to restrain the issuance of bonds because the bonding power of the corporation had been exhausted. A receivership was contemplated and a bill drafted. Separate suits were started in the States through which roads comprising the system ran. They represented a contest between Austin Corbin, Kelly's client, and the board in control of the road. He had been president, but had resigned, possibly under pressure. The suits were started in the name of Goldsmith, a liquor dealer of Boston, who was a stockholder. The season of financial depression was on. After carrying on the litigation with success, so far as it progressed, Corbin, in 1893, quit and directed Kelly to give no further attention to it on his account, advising him that the New Haven, which had meanwhile acquired the property in foreclosure proceedings, would take care of the litigation. He insists that Corbin was in no way associated with the New Haven at the time the suits were commenced, that Corbin indeed was fighting that system, running a rival road. Be that as it may, there is not a breath of testimony that Brandeis knew or had any reason to suspect that Corbin was acting for the New Haven, if he was, nor is it intimated that the suits were without foundation, so palpably baseless as to suggest to an ordinary lawyer that they were malicious.

In 1893 the Massachusetts Legislature inquired whether the New Haven had not forced the New England into insolvency with a view to the monopolization of transportation facilities. The examination was conducted by Mr. Storey. He called Mr. Brandeis and interrogated him concerning the suits and his employment. Brandeis quite deferentially declined, in the first place, to tell, claiming the privilege and the duty of counsel, but later told, as herein set out, about the matter. The litigation had evidently engendered bad blood between these two lawyers, as evidenced by the examination referred to. I should be loathe to believe that Mr. Storey carried to this day the animosity thus aroused, but the opinion of a man often defies analysis.

Another protesting ex-president of the American Bar Association, Simeon E. Baldwin, was counsel in Connecticut in that litigation for the directors of the New England road, which Corbin charged with misdeeds of many kinds. This affair narrows down to the question of the offense of Brandeis in bringing the suit in the name of Goldsmith, who was fully indemnified by Corbin. Goldsmith afterwards sued the Corbin estate to recover on account of expenses incurred in the litigation. It was not asserted that the court held that his agreement with Corbin was contrary to public policy or good morals.

It is conceded that whatever right Corbin had to maintain the actions, Goldsmith had the same right. The question is akin to that presented in the Ballinger case.

The Supreme Court of the United States held in *Wheeler v. Denver* (229 U. S., 342) that a taxpayer could maintain a suit in the Federal court, though it was brought by his permission by the attorneys for a corporation which could not sue therein, which had indemnified him against costs and damages, provided the attorneys, and borne all the expenses.

A fight was waged in my home city for years between the municipality and a water company. On a number of occasions when action was taken by the city which the company thought inimical to its rights or interests, and which in its opinion would justify a taxpayer's suit, it got some friend, possibly a director of the company, to bring suit; that is, started suit in the name of the taxpayer under an indemnity to him. The most high-minded lawyers at our bar have pursued this course, and it never occurred to me that they were subject to disbarment or open to censure for having appeared as they did. What harm is done? What evil is to be feared? Isn't it true that the law is no respecter of persons? The "saloon keeper" Goldsmith looked to the court quite like the capitalist Corbin. It does not appear why Corbin preferred not to have the suit brought in his name, but, as in the Ballenger case, it was generally known that he was back of them. They were referred to as "the Corbin suits." That is immaterial. It was of no consequence to the court in the determination of the suits whether Goldsmith proceeded on his own motion or at the instigation of some one else. Neither the facts nor the law could be affected.

#### THE ILLINOIS CENTRAL.

This complaint simmers down to a question of whether Mr. Brandeis dissimulated or prevaricated in a statement made in a letter in relation to his being or having been the attorney for E. H. Harriman. The letter having been read and the facts having been developed by testimony, Senator Cummins, a member of the committee, addressed the following question to Mr. Fox, who was conducting the case for the protestants:

Senator CUMMINS. I would like to know, before we go further, your view of Mr. Brandeis's statement or letter to Mr. Walker. Wherein do you think it shows false? Wherein do you think that it departs in any degree from the truth? (Hearings, 354.)

To this he got no answer; presumably because Mr. Fox was able to give none. Neither am I.

#### THE SHOE MACHINERY CO.

Mr. Winslow, president of the Shoe Machinery Co., heretofore referred to, made bitter complaint against Brandeis. Prior to 1899, when that company was organized, the latter had been the representative—business rather than legal, apparently—of the Henderson family, of Chicago, owning interests in one of the companies uniting to form the Shoe Machinery Co. Brandeis became one of 19 directors in view of the interest referred to and had such part in the work of the board as a director not immediately concerned with the management of the business ordinarily has, being one of 19.

Perhaps more, because his business capacity is perhaps not much less marked than his talent as a lawyer. His firm, though not the general counsel for the company, was frequently employed by it. In 1906 an attempt was made before the Massachusetts Legislature to have an act passed declaring void so-called "tying clauses" in leases under which the company let out its machinery. At the request of Mr. Winslow, the president, Mr. Brandeis appeared before a committee and made an argument against the bill. It will be noted that the

bill proceeded upon the assumption that the tying clauses were perfectly legal. It proposed to outlaw them. Up to that time the legality of the clauses in question had not been the subject of any special comment, and nothing appears to show that the Brandeis firm had ever been called upon to express an opinion on the subject. In the effort to defeat this legislation the Shoe Machinery Co. had the cooperation of a number of the shoe manufacturers, clients of Brandeis, whose sympathy and help had been enlisted partly, at least, through his efforts.

The controversy directed attention in a special way to the specific provisions of the leases and the legislation failed, due to some extent at least, to a promise secured by Brandeis from Winslow to confer with the shoe manufacturers concerning certain provisions of the leases to which, as the contest proceeded, they expressed a decided objection. These conferences took place in the fall, Brandeis insisting that the leases should be changed, but without convincing Winslow. Thereupon Brandeis resigned as a director of the company. Some lawsuits then pending, apparently of no great consequence, in which his firm represented the company, were afterwards tried, but save for that work all his relations with the company ceased.

In 1907 the Massachusetts Legislature passed an act outlawing tying contracts. The bright legal minds which then guided the affairs of the Shoe Machinery Co. found it easy to circumvent the law, as they thought, by inserting a provision in the lease authorizing the company to cancel it at will. A lease could be avoided, then, against any man who appealed to the new law.

In 1911 the Supreme Court affirmed the decisions in the Standard Oil and American Tobacco Co. cases. Other decisions were rendered shaking the faith of many people that a combination, the basis of which was patent rights, was immune under the Sherman law. Enlightened by these cases the Brandeis firm gave an opinion to the effect that the tying clauses were void under the Sherman Act, of course with respect to interstate business.

Meanwhile the Thomas G. Plant Co. was acquired by the Shoe Machinery Co., as heretofore recited. Thereafter at hearings before congressional committees and in public addresses to illustrate some point he was making in connection with the trust problem, Brandeis frequently referred to the oppressive tying clauses of the Shoe Machinery Co.—which by the way were a growth dating from 1861—and to practices of that company, all of which he roundly denounced. It is not claimed that he ever disclosed any facts concerning its business not long public property, of which he might have learned either as director of the company or as casual attorney for it. Indeed, the things of which he complained had already been communicated to the Department of Justice, and had been the subject of comment by representatives of the shoe manufacturers before committees of Congress.

Mr. Winslow seems to be possessed with the idea that because Brandeis had taken fees from the Shoe Machinery Co. he bound himself forever not to criticize its policy or its practices—that in a way he had violated his fealty. It is not an uncommon view on the part of those who manage great industries and command many men that they may insure the support of lawyers on public questions by putting them on the pay roll or paying them from time to time for legal services.

In the case of Brandeis the assumption seems not to have been well founded. In that he did something to dispel that notion, he deserves well of his profession.

It is claimed that in some respects his position in relation to questions in which that company was concerned was inconsistent. Doubtless he finds it easy to reconcile whatever differences may appear or he may frankly admit that on at least one occasion he was in error. What if he was inconsistent? Is it forbidden to a man that he change his mind?

If in the impetuosity of attack or the ardor of advocacy he was led sometimes into giving too vivid a hue to the facts touching the methods of business of Mr. Winslow's company or drew unwarranted conclusions from them, there was no such obliquity of mind disclosed or faults of character revealed as would in any wise unfit him for judicial duties. It is impossible in reason to attribute his attitude toward the Shoe Machinery Co. after he parted company with it to any but the most creditable motives. There had been no quarrel, no heated interchanges, when the separation came that might have bred some deep-seated resentment to satisfy which the subsequent accusations were made by Brandeis. He was moved either by a sincere purpose to serve the public interest or he was playing the part of a demagogue. Few who plead the cause of the great public escape the imputation from those whose privileges they seek to curtail of pandering to popular prejudice.

In the Illinois Central matter he was getting proxies in New England for what may be called the Harriman interests as against the Fish interests while he was fighting the merger of the Boston & Maine. In these matters, too, it is said he occupied positions that were wanting in consistency. It would serve no useful purpose to inquire whether the local fight was an attempt to "Harrimanize" New England or whether the ousting of Fish was to be desired notwithstanding the influence of Mr. Harriman would be extended.

#### THE GILLETTE SAFETY RAZOR CASE.

I shall not enter into the details of this matter. Brandeis's firm was employed to defend the directors of that company in a maladministration suit, and to resist actions brought by various parties against the directors to rescind sales of stock sold them without disclosing the true value of it and the condition of the company.

While these actions were pending the defendants quarreled. Certain of them, including Gillette, the inventor of the device, fearing a plot on the part of others to oust them from the directory, went to Brandeis and employed him to help them to secure enough outstanding stock to give them control. He did so, and the firm continued to defend them all, in the actions in which they were employed, until they were finally disposed of. None of the parties are complaining, but the plaintiff in one of the annulment suits had some stock. Brandeis besought his attorney to induce his client to sell. He did so, and the stock was acquired. Now the attorney for another claimant prosecuting a similar suit, but who owned no stock of record, had been associated on the record as counsel for the plaintiff. The original attorney asserts that Brandeis asked him in the course of the negotiations not to mention the matter to the attorney for the other claim-

ant who had thus been associated. He bore no relation whatever to the directors to whose interests it is suggested Brandeis was not faithful. They are, as stated, not complaining, nor does it appear that they ever did complain.

#### THE ADVANCE RATE CASE.

Mr. Brandeis was employed by the Interstate Commerce Commission to resist the application of the railroads made in 1913 for a 5 per cent increase in freight rates. He had appeared for certain shippers in a similar application which had been made in 1910, and which had been denied.

Clifford Thorne, one of the railroad commissioners of the State of Iowa, appeared for various shippers and for the State authorities for a number of the Central Western States, who naturally resisted any raise.

The inquiry involved two questions; first, as to whether the net revenues of the railroads as a whole were adequate—that is, without any new economies or change of business methods; and, second, if they were not, how were the net revenues to be increased, and particularly whether they were to be increased by a general raise.

The shipper is not ordinarily concerned, or, at least, not so deeply concerned about what the rate is going to be on any commodity except his own. It may be that the rates as a whole do not produce the requisite revenues and that something additional ought to be raised by an increase on his particular line of goods.

An attorney to represent all interests, as one employed by the commission must, approaches the proposition from a slightly different angle from that from which the attorney for the shipper views it.

It was assumed, however, that the railroads would be represented by able counsel who might be relied upon to bring out all facts helpful to their side of the case.

Mr. Thorne, whose diligence and fidelity, not to speak of his talents, which are undoubtedly of high order, can not be too much commended, in his testimony and in his argument before the commission advanced that the net revenues on the whole were sufficient to pay the companies a reasonable return on their investment.

Mr. Brandeis, in closing the case, declared that in his opinion they were not on the whole sufficient. He then proceeded to tell how by making readjustments here and instituting economies there they could be made sufficient without any raise in general rates. The increase was denied. It is said that Brandeis should not have made the admission that he did. Naturally it was disappointing to Mr. Thorne, but no one suggests, not even Thorne, except from his manner, that Brandeis had not reached the conclusion he announced after a thorough and painstaking inquiry, bringing to bear on the subject his masterful faculty in the analysis of accounts. But it is asserted that he might have said, "If it be conceded, etc.," or "I shall assume for the purpose of the argument, etc."

Mr. Brandeis's critics are hard to please. In the Ballinger and Goldsmith cases it is said he should have been more frank with the court; in this case, that he should have been less so.

The remainder of the matters submitted to the committee do not seem to require notice. It would be useful, perhaps, if time per-

mitted, to outline them in order to show the frivolous character of most of them—indicating a straining after results and a consciousness that the case made on the matters reviewed is a weak one.

The real crime of which this man is guilty is that he has exposed the iniquities of men in high places in our financial system. He has not stood in awe of the majesty of wealth. He has, indeed, often represented litigants, corporate and individual, whose commercial rating was high, but his clients have not been exclusively of that class. He seems to have been sought after in causes directed against the most shining marks in it. He has been an iconoclast. He has written about and expressed views on "social justice," to which vague term are referred movements and measures to obtain greater security, greater comfort, and better health for the industrial workers—signifying safety devices, factory inspection, sanitary provision, reasonable hours, the abolition of child labor, all of which threaten a reduction of dividends. They all contemplate that a man's a man and not a machine. A letter addressed to me by Hon. David I. Walsh, concerning his activities in a public way in the State of Massachusetts, affords some light on the opposition to this nomination. It is made an appendix hereto.

It is said that it is to be regretted that any such controversy as this in which we are involved should arise over a nomination of a justice of the Supreme Court. So it is. But when it is said further that one might better be chosen over which no such bitter contention would arise, I decline to follow. It is easy for a brilliant lawyer so to conduct himself as to escape calumny and villification. All he needs to do is to drift with the tide. If he never assails the doer of evil who stands high in the market place, either in court or before the public, he will have no enemies or detractors or none that he need heed. The man who never represents the public or the impecunious citizen in any great forensic contest, but always the cause of corporate wealth, never has these troubles. It is always the other fellow whose professional character is a little below par.

The bar is still the bulwark of the liberties of the people. To it they must look in the future as they have looked in all of our history for fearless champions. Discouragements enough beset the ambitious youth who resolutely sets out upon the path of devotion to duty and to the cause of justice, who strives to render some real public service. I do not care to warn him to abandon the hope of reaching the summit of his profession by that route.

My vote is for the confirmation of the nomination of Louis D. Brandeis for associate justice of the Supreme Court.

Respectfully submitted.

THOMAS J. WALSH.

APRIL 3, 1916.

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#### APPENDIX.

WASHINGTON, D. C., *February 7, 1916.*

MY DEAR SENATOR WALSH: It seems to me a public duty to write to you in regard to the appointment of Mr. Louis D. Brandeis, of Massachusetts, as a justice of the Supreme Court of the United States. During the two years I was governor of Massachusetts, and in the years preceding them, I had repeated occasions to observe this man and his high ideals and common sense; his wide practical knowledge of the law; his extensive understanding of the business, economic, and social problems of our

time; his sound judgment and ardent devotion to the public welfare. As you know, we are justly proud of the number and ability of our public-spirited men in Massachusetts, and it would be difficult to point out a better example of generous, unpaid, diligent constructive work upon the side of the public interests than that which has been done by Mr. Brandeis.

On numerous occasions, beginning at least as far back as 1896, whenever the creation and control of the Boston subways was before the legislature, he has been, as a private citizen, a tireless and successful leader against powerful opposition in support of the principle that the value of the subway franchises should be kept for the public, after giving to the operating company a reasonable return for services rendered. He declined to accept any compensation for his long continued and very valuable constructive work during all these years in this cause.

When the gas situation in Boston appeared to be in a hopeless condition he urged again as a private citizen the plan by which the dividends of the gas company were made dependent upon the price charged for gas to the consumers. This has resulted in a reduction in the price of gas to the public and in a corresponding increase in dividends to stockholders of the company.

When the insurance investigations occurred he devised and successfully pressed for legislation in Massachusetts permitting, for the first time in this country, our savings banks to issue small-payment life insurance policies. This has resulted in an opportunity for our working people to insure themselves at much lower rates than were being charged by the industrial insurance companies and has led these companies to make lower rates. To my personal knowledge Mr. Brandeis has given annually thousands of dollars to further the work of bringing to the working people of our State this opportunity for less costly insurance. For more than 20 years prior to the Massachusetts law there had been no reduction in the cost of industrial insurance, but since the passage of the law so successfully advocated by Mr. Brandeis in Massachusetts, the premiums of the old-line companies have been reduced on an average 20 per cent, thus saving to the people of this country, insured in industrial companies, from \$15,000,000 to \$20,000,000 annually and to the people of Massachusetts about \$1,000,000.

The system of arbitration which he devised for the New York Garment Workers is an equally significant example of his judicial qualities and his public service in other fields.

In 1906 the people of New England began to awaken to the fact that the New Haven Railroad was apparently successfully seeking to create a New England transportation monopoly. The event which focused public opinion most sharply was the acquisition of the controlling interest in the Boston & Maine Railroad. Mr. Brandeis, again as a private citizen, commenced an exhaustive study of this railroad problem and made public an analysis of the financial condition of the New Haven Railroad, pointing out for the first time to the people of New England the inevitable disaster sure to result from the course of mismanagement and waste then being pursued. His advice was unheeded, his warning derided, and his motives impugned. But time has shown that his conclusions were based upon carefully ascertained facts, to which he applied the clearest and most cogent reasoning power. Three years ago what he prophesied nine years ago became apparent to all and is now a matter of public knowledge and of record in Senate documents and elsewhere.

I instance these, among many public services covering a long period of years, as illustrative of the work done as a private citizen in the service of the public interest without compensation, at a large expenditure of his own time in the midst of a very active professional life.

Indeed, in extensive acquaintance with public men I know of no one who without emolument or honors of public office has given so much of the valuable constructive service of a trained lawyer to the public weal as Mr. Brandeis.

I have written mainly of Mr. Brandeis's public work for the past 20 years, but I would not have you overlook that before he engaged in these public activities out of which have grown results for which he is entitled to the gratitude of the American people, he had achieved already a position at the Massachusetts bar which would well have warranted his appointment to the Supreme Court at the age of 40. He is a great lawyer and a great citizen. Is not this a combination for a great judge?

Were I not hastening on a far journey I would seek a personal interview with the committee, but failing such opportunity, I venture to emphasize and perhaps to repeat some of the things I said to you orally, and I hope that you will communicate them to your committee, together with my very best respects.

Very sincerely yours,

DAVID I. WALSH, *Boston, Mass.*

HON. THOMAS J. WALSH,  
*The Senate, Washington, D. C.*

On May 10, 1916, the Committee on the Judiciary appointed the same subcommittee, with the exception that Senator Borah took the place of Senator Cummins (absent), to take further evidence regarding the matter brought to the attention of the committee by a member of the committee concerning the relation of Mr. Brandeis with a drug merger.

This subcommittee met on May 12, 1916, and heard the testimony of Mr. Louis K. Liggett, Mr. Frederick E. Snow, and Mr. George W. Anderson, and also heard the testimony of Hon. James S. Harlan, member of the Interstate Commerce Commission, all of which evidence was printed as a part of the record.

It seems that there was a holding company formed to take over certain drug companies, and Mr. Brandeis was consulted as to the legality of the corporation and proposed combination.

There was nothing in the employment out of the ordinary, and since the evidence was taken no one has suggested that there was anything improper in the employment or anything to be criticized in what Mr. Brandeis said or did. It was a proper employment, and, unless this committee is to supervise the private practice of the law, there is nothing regarding the charges to discuss.

This supposed charge is one of many which come under the notice of an honorable member of the committee, and he in good faith brought it to the attention of the committee, which, regarding its source, felt called upon to take the evidence.

We venture to introduce further comment upon this nomination with the following from an address made by Mr. Brandeis on May 4, 1905, before the Harvard Ethical Society, as follows:

It is true that at the present time the lawyer does not hold as high a position with the people as he held 75 or, indeed, 50 years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.

The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations.

For nearly a generation the leaders of the bar have, with few exceptions, not only failed to take part in constructive legislation designed to solve, in the public interest, our great social, economic, and industrial problems, but they have failed likewise to oppose legislation prompted by selfish interests.

No doubt the distinguished audience which heard this address, as well as the bar and public generally, approved it; that the distinguished author of it deigned to put it into actual practice should go to his credit rather than to his prejudice.

The Five Per Cent Rate case was somewhat illuminated by the testimony of Hon. James S. Harlan, member of the Interstate Commerce Commission, found in part 22 of the hearings at page 157. This evidence makes it clear that the charges brought by Mr. Thorne



against Mr. Brandeis are certainly not taken seriously by the Interstate Commerce Commission. Mr. Harlan reviews the whole circumstances concerning the employment, and we quote from that part of his evidence, as follows:

Senator WALSH. Mr. Harlan, I want to ask you a question or two. I should like to inquire of you whether it had ever occurred to you or to any of the members of the commission, so far as you are permitted to speak for them, that Mr. Brandeis had been faithless to the commission or to the public in the discharge of the duties which he undertook?

Mr. HARLAN. Senator, I feel assured that I represent the views of my colleagues when I say that no such thought ever occurred to any of us. So far as I am concerned, personally, if I may express a personal view, I can not associate such an idea with Mr. Brandeis. It is not consistent with my view of him or with the impressions that I have formed from a long acquaintance with him.

Senator WALSH. Doubtless you know, Mr. Commissioner, the nature of the complaint made in this connection. It appears to be that, the questions involved being, first, whether the net revenues of the railroads as a whole, without any economies or change of business methods, were adequate, and, second, if they were not, by what means they should be made adequate. Mr. Brandeis, in opening the discussion before the commission, made the statement in effect that, in his opinion, the revenues of the railroad companies were not on the whole adequate, considering the needs of the railroads and the general welfare of the community. Do you recall the statement to which I allude?

Mr. HARLAN. Yes; I do, Senator.

Senator WALSH. In a general way at least?

Mr. HARLAN. Yes; I do.

Senator WALSH. What was your view as to the propriety or the impropriety of Mr. Brandeis expressing any such opinion as that to you in the course of his discussion of the matter as he had investigated it?

Mr. HARLAN. It never occurred to me that there was any impropriety in it. On the contrary, as I view the situation, it was precisely the sort of view that we looked to counsel to express as the result of his study of the case and the record as it lay before us. I do not mean, in saying that, that we had expected him to reach that conclusion on the record before us; I mean to say that it was that sort of judgment that we wanted from all the counsel discussing that case, and particularly from Mr. Brandeis. He had, of course, been in the case from the beginning. We wanted him to develop the facts—all the facts—that might bear upon the public interest, and I know of no more important fact in such a case than precisely that question. If the revenues of the carriers, the net incomes of the carriers, were not sufficient that was something that we ought to know. It was one of the questions that the commission undertook to investigate. Having retained Mr. Brandeis to bring out all the facts of value, as I have explained, I do not see how he could have failed, when discussing the record, to advise us of any conclusion he had reached from his study of the testimony and evidence adduced, and to point out from the record, as he did, the reasons for that conclusion. We were entitled to have the views of those who had studied the record. As far as I know, the impropriety of the statement by him, to which you refer, has never occurred to any of my colleagues. But in saying that, and in what I have said or shall say I speak only for myself.

Senator WALSH. That is all.

Senator WORKS. Mr. Harlan, that admission, if we call it an admission, practically covered the whole case, did it not?

Mr. HARLAN. Why, no, Senator.

Senator WORKS. The very question you had before you was whether these rates should be increased as asked for by the carriers, was it not?

Mr. HARLAN. Well, whether the net revenues were adequate in the public interest was a very different question from the reasonableness of the rates which were then in existence, or the rates which were proposed by the carriers.

Of Mr. Brandeis, Mr. Harlan said further in his testimony:

Mr. HARLAN. I do not believe that I am prepared to make any response to that question. I will say that, as far as my experience goes with Mr. Brandeis, he is a man who showed at all times great consideration for others. I do not

believe that Mr. Brandeis would consciously have done an unfair thing. I am perfectly certain that in saying what he did he was moved by a sense of duty, upon the record, to the commission. No other thought about it has ever occurred to me, and I never have heard any of my colleagues indicate any criticism of it, or that they were surprised by it. Now, that may not be responsive to your question.

Again, in answer to a question by Senator Fletcher, the following occurred:

Senator FLETCHER. And no matter what Mr. Brandeis or any of the counsel may have stated in argument, the commission itself had the whole record before it and all the facts were collected, and there has been no claim that any shipper or any other interest was omitted in the collection of the facts.

Mr. HARLAN. No; I have heard no criticism of that kind, and I do not think there is any basis for such criticism. I want to say also that I do not think the commission ever dealt with any case that engaged the personal attention of each commissioner more deeply and for a greater length of time than did the Five Per Cent case.

Again, in answer to a question by Senator Works, Mr. Harlan said:

Senator WORKS. I believe it was testified at this hearing with respect to this particular case, by one of those attorneys that you had previously employed, that he never assumed to give any such advice or opinion respecting such a matter as this but simply developed the facts.

Mr. HARLAN. I do not know who that was; but my own recollection is, and my understanding is, that we expect those who are retained by the commission for this purpose to be of aid to the commission not only in developing the facts but after weighing the record in pointing to the conclusions that the record seems to justify; and as I have said before, I say again, that I heard no comment or criticism in the commission of Mr. Brandeis's course upon the argument.

Senator FLETCHER. I understand that there was in your mind in writing the letter that presenting the other side meant in the argument of this case and when the facts were collected?

Mr. HARLAN. When the broad record was made.

Senator FLETCHER. As you expressed it further down in the letter: "And I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record," etc. Was there any claim or suggestion that he failed or neglected to do that?

Mr. HARLAN. I have heard none at all.

Senator FLETCHER. Even Mr. Thorne, in complaining about the statement made by Mr. Brandeis, never contended that Mr. Brandeis had failed in the effort to collect all the facts in the case?

Mr. HARLAN. I do not recall that he made that criticism, Senator.

Senator FLETCHER. Then, when you announced one issue in the language mentioned, "Do the present rates of transportation yield an adequate return to common carriers"? Is not that a different question than whether or not the net income of the railroads—the net operating revenues of the railroads—are sufficient?

Mr. HARLAN. I regard it, of course, as a very different question.

Senator FLETCHER. Yes.

Mr. HARLAN. I mean there is a very distinct difference between the two questions.

Senator FLETCHER. A very distinct difference?

Mr. HARLAN. Yes.

Senator FLETCHER. So that when an admission is made that the net operating revenues of a railroad company are insufficient, or the net income is insufficient as the road is being operated, it is not an admission that the rates are inadequate?

Mr. HARLAN. No; by no means. The adequacy of net operating revenues brings up questions of credit, adequate facilities, efficient service, extension of tracks, and matters of that kind. Whether the rates are adequate brings into view their reasonableness and related questions. As I have before pointed out, the commission held in the first report in the Five Per Cent case that the net

operating revenues of the carriers were inadequate in the public interest, but at the same time we denied the increased rates demanded by the carriers and permitted an increase in central freight association territory only in connection with a finding that those rates were unduly low when compared with rate structures elsewhere in the country.

Senator CHILTON. It therefore follows that Mr. Brandeis's admission did not answer and conclude the first proposition that you presented?

Mr. HARLAN. Well, it certainly did not conclude it with the commission.

At another place in the evidence Mr. Harlan says:

But I do not understand that Mr. Brandeis was on either side. He was there in the public interest.

At another place, speaking for the commission, he said that the services of Mr. Brandeis were "eminently" satisfactory.

It seems to us that this evidence makes it perfectly clear that the charge of Mr. Thorne can not be sustained, but that on the contrary the conduct of Mr. Brandeis in this matter was honorable, in every way satisfactory to the commission, and showed fidelity to a most important trust.

In view of the fact that some citizens of great prominence have protested against this nomination, reference may properly be made to certain letters concerning Mr. Brandeis. One is a letter from the President of the United States in answer to a letter from Mr. Culberson, chairman of the Committee on the Judiciary, which letter and the reply thereto follow:

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D. C., May 5, 1916.*

DEAR MR. PRESIDENT: As you are aware, the Committee on the Judiciary of the Senate has under consideration the nomination of Mr. Louis D. Brandeis for Associate Justice of the Supreme Court of the United States.

In response to the formal and usual request of the committee made to the Attorney General for all papers in the possession of his department touching this nomination, he replied that there were no such documents in his department.

Inasmuch as this request usually results in the presentation to the Committee on the Judiciary of papers showing the reasons which actuated the President in making the nomination, I would be glad to have you state these reasons, for the benefit of the committee, in case you see no objection to so doing.

Very sincerely, yours,

C. A. CULBERSON.

To the PRESIDENT,  
*The White House.*

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THE WHITE HOUSE,  
*Washington, May 5, 1916.*

MY DEAR SENATOR: I am very much obliged to you for giving me an opportunity to make clear to the Judiciary Committee my reasons for nominating Mr. Louis D. Brandeis to fill the vacancy in the Supreme Court of the United States created by the death of Mr. Justice Lamar, for I am profoundly interested in the confirmation of the appointment by the Senate.

There is probably no more important duty imposed upon the President in connection with the general administration of the Government than that of naming members of the Supreme Court; and I need hardly tell you that I named Mr. Brandeis as a member of that great tribunal only because I knew him to be singularly qualified by learning, by gifts, and by character for the position.

Many charges have been made against Mr. Brandeis; the report of your subcommittee has already made it plain to you and to the country at large how unfounded those charges were. They threw a great deal more light upon the character and motives of those with whom they originated than upon the qualifications of Mr. Brandeis. I myself looked into them three years ago when I desired to make Mr. Brandeis a member of my Cabinet and found that they proceeded for the most part from those who hated Mr. Brandeis because he had refused to be serviceable to them in the promotion of their own selfish interests and from those whom they had prejudiced and misled. The propaganda in this matter has been very extraordinary and very distressing to those who love fairness and value the dignity of the great professions.

I perceived from the first that the charges were intrinsically incredible by anyone who had really known Mr. Brandeis. I have known him. I have tested him by seeking his advice upon some of the most difficult and perplexing public questions about which it was necessary for me to form a judgment. I have dealt with him in matters where nice questions of honor and fair play, as well as large questions of justice and the public benefit, were involved. In every matter in which I have made test of his judgment and point of view I have received from him counsel singularly enlightening, singularly clear-sighted and judicial, and, above all, full of moral stimulation. He is a friend of all just men and a lover of the right; and he knows more than how to talk about the right—he knows how to set it forward in the face of its enemies. I knew from direct personal knowledge of the man what I was doing when I named him for the highest and most responsible tribunal of the Nation.

Of his extraordinary ability as a lawyer no man who is competent to judge can speak with anything but the highest admiration. You will remember that in the opinion of the late Chief Justice Fuller he was the ablest man who ever appeared before the Supreme Court of the United States. "He is also," the Chief Justice added, "absolutely fearless in the discharge of his duties."

Those who have resorted to him for assistance in settling great industrial disputes can testify to his fairness and love of justice. In the troublesome controversies between the garment workers and manufacturers of New York City, for example, he gave a truly remarkable proof of his judicial temperament and had what must have been the great satisfaction of rendering decisions which both sides were willing to accept as disinterested and even-handed.

Mr. Brandeis has rendered many notable services to the city and State with which his professional life has been identified. He successfully directed the difficult campaign which resulted in obtaining cheaper gas for the city of Boston. It was chiefly under his guidance and through his efforts that legislation was secured in Massachusetts which authorized savings banks to issue insurance policies

for small sums at much reduced rates. And some gentlemen who tried very hard to obtain control by the Boston Elevated Railway Co. of the subways of the city for a period of 99 years can probably testify as to his ability as the people's advocate when public interests call for an effective champion. He rendered these services without compensation and earned, whether he got it or not, the gratitude of every citizen of the State and city he served. These are but a few of the services of this kind he has freely rendered. It will hearten friends of community and public rights throughout the country to see his quality signally recognized by his elevation to the Supreme Bench. For the whole country is aware of his quality and is interested in this appointment.

I did not in making choice of Mr. Brandeis ask for or depend upon "indorsements." I acted upon public knowledge and personal acquaintance with the man, and preferred to name a lawyer for this great office whose abilities and character were so widely recognized that he needed no indorsement. I did, however, personally consult many men in whose judgment I had great confidence, and am happy to say was supported in my selection by the voluntary recommendation of the Attorney General of the United States, who urged Mr. Brandeis upon my consideration independently of any suggestion from me.

Let me say by way of summing up, my dear Senator, that I nominated Mr. Brandeis for the Supreme Court because it was, and is, my deliberate judgment that, of all the men now at the bar whom it has been my privilege to observe, test, and know, he is exceptionally qualified. I can not speak too highly of his impartial, impersonal, orderly, and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions and insight into their spirit, or of the many evidences he has given of being imbued to the very heart with our American ideals of justice and equality of opportunity; of his knowledge of modern economic conditions and of the way they bear upon the masses of the people, or of his genius in getting persons to unite in common and harmonious action and look with frank and kindly eyes into each other's minds, who had before been heated antagonists. This friend of justice and of men will ornament the high court of which we are all so justly proud. I am glad to have had the opportunity to pay him this tribute of admiration and of confidence; and I beg that your committee will accept this nomination as coming from me quick with a sense of public obligation and responsibility.

With warmest regard, cordially and sincerely yours,

WOODROW WILSON.

HON. CHARLES A. CULBERSON,  
*United States Senate.*

We submit also the following letter from Prof. Charles W. Eliot, emeritus president, Harvard University:

CAMBRIDGE, MASS., May 17, 1916.

DEAR SIR: I have known Mr. Louis D. Brandeis for 40 years, and believe that I understand his capacities and his character. He was a distinguished student in the Harvard Law School in 1875-78. He possessed by nature a keen intelligence, quick and generous sympathies, a remarkable capacity for labor, and a character in which gentleness, courage, and joy in combat were intimately blended. His professional career has exhibited all these qualities, and with

them much practical altruism and public spirit. He has sometimes advocated measures or policies which did not commend themselves to me; but I have never questioned his honesty and sincerity, or his desire for justice. He has become a learned jurist.

Under present circumstances, I believe that the rejection by the Senate of his nomination to the Supreme Court would be a grave misfortune for the whole legal profession, the court, all American business, and the country.

Sincerely, yours,

CHARLES W. ELIOT.

HON. CHARLES A. CULBERSON.

Also, the following letter from Charles B. Greenough:

262 WASHINGTON STREET,  
Boston, Mass., May 19, 1916.

HON. CHARLES A. CULBERSON.

DEAR SIR: In reading the report of the hearings before the subcommittee of your committee on the question of approval of the nomination of Mr. Brandeis it has seemed to me that the testimony of some of the lawyers from this city as to the reputation of Mr. Brandeis did not do him justice.

I think I am able to speak with some authority, as I have been secretary of the bar association, treasurer, member of the council, vice president, and president from 1902-1905. These positions gave me an excellent opportunity of knowing the character and reputation of the members of the bar. I was also chairman of the grievance committee of the bar association for 15 years, and during these years there had not been to my knowledge any complaint against Mr. Brandeis's character or method of practice.

I know there is among a number of our leading attorneys a strong feeling of antagonism to Mr. Brandeis, which I attribute entirely to two causes: First, the vigorous and I think outrageous attacks upon him for his opposition to the United Shoe Machinery Co. in 1909. Thousands of pamphlets were sent to members of the bar. I myself received several, and I have no doubt many received their impressions from these public repeated attacks, which could not be as widely answered. The second reason was his attack on the New York, New Haven & Hartford Railroad Co. All holders of the stock resented his attacks and he was called a liar, a railroad wrecker, and many other similar names. As every trustee in New England held the stock—I held a lot of it myself, and was for a time inclined to resent his action—I have no doubt the distrust of him was increased thereby. That he was right, and conclusively shown to be so, came too late to dissipate the impression already formed.

At all times, however, and now his firm has the very best of reputation, and is the one most sought by students from the Harvard Law School.

I think I am justified in saying that a large number of the members of the bar to-day have a great respect for his ability and for his remarkable devotion to the public good, and would retain him without hesitation and with entire confidence in any matter relating to their own interests.

Very truly, yours,

CHARLES B. GREENOUGH.

An impression has gone abroad that a great majority of the lawyers of Boston and vicinity are protesting against this nomination. That is a great mistake, as may be shown, and we, therefore, attach some letters from prominent lawyers and eminent citizens of that community as an appendix to this report. It will be noted that among that number are the following:

Roscoe Pound, new dean of Harvard Law School and eminent juridical scholar.

George B. Dorr, friend of Samuel D. Warren.

Joseph B. Eastman, member of Public Service Commission, Massachusetts, formerly secretary Public Franchise League.

David I. Walsh, recently governor of Massachusetts.

A. S. Hall, lawyer, practicing in Boston during Brandeis's entire career.

W. T. A. Fitzgerald, register of deeds, Suffolk County, Mass.

Lionel Norman, lawyer, characterizing narrowness of opposition.

J. M. Head, lawyer, knowing Brandeis 40 years.

Richard H. Dana, lawyer, long prominent leader in Civil Service Association.

John W. Cummings, a leading lawyer, Bristol County, bar, supposed to have been offered and declined appointment to superior court.

Melvin C. Adams, former United States district attorney.

Joseph C. Pelletier, State district attorney.

John A. Coulthurst, member of the city council and candidate for mayor.

George U. Crocker, member finance commission.

Samuel K. Hamilton, president Middlesex Bar Association.

Roger Sherman Hoar, former Assistant Attorney General.

James P. Magenis, finance commission.

Frederick W. Mansfield, former State treasurer.

Robert W. Nason, former assistant district attorney.

W. R. Sears, of Whipple's firm.

John R. Thayer, of Worcester.

James H. Vahey, formerly candidate for governor.

George Wigglesworth.

Arthur D. Hill, professor in Harvard Law School.

Prof. William Z. Ripley, of Harvard.

Rev. Edward Cummings, successor of Edward Everett Hale.

Bernard J. Rothwell, former president, chamber of commerce.

Henry S. Dennison, vice president, chamber of commerce.

Robert A. Woods, license commissioner.

William Lloyd Garrison.

Mark de Wolfe Howe, editor Harvard Bulletin.

President Bumpus, of Tufts College.

Robert N. Washburn, brother of Representative Charles G. Washburn, of Worcester.

It has been urged that in view of the fact that these charges have been made, and, at best, there may be still a doubt in the minds of many as to the truth of some of them, this nomination should be rejected.

For the reasons stated in the report of the majority members of the subcommittee, we can not concur in this view, but there are many other considerations which make such a proposition unthinkable. First, the precedents of the Senate are against any such theory. The appointment of Chief Justice Marshall and Justice Story, Justice Taney and Justice Matthews were viciously attacked.

There were no ex-presidents of the American Bar Association to give their testimony as to the first two, but they did not lack critics of such high position as to impair their reputation at the time, and the criticisms from those of a different political faith were in no wise confined to political opinion.

Of Marshall, Thomas Jefferson said:

Never will chicanery have a more difficult task than has now been accomplished to warp the text of the law to the will of him who is to construe it.

The judge's inveteracy is profound and his mind of that gloomy malignity, which will never let him forego the opportunity of satiating it on a victim.

An opinion is huddled up in conclave perhaps by a majority of one delivered as if unanimous, and with the silent acquiescence of lazy or timid associates by a crafty judge who sophisticates the law to his own mind by the turn of his own reason.

It (Marshall's *Life of Washington*) is written, therefore, principally with a view to electioneering purposes. It will consequently be out in time to aid you with information, as well as to point out the perversions of truth necessary to be rectified.

These opinions from this respectable source were of a man of whom William Wirt said:

Marshall was justly pronounced one of the greatest men of the country; and William Pinckney said:

A man born to be the Chief Justice of any country into which Providence should have cast him;

and John Quincy Adams said:

He was one of the most eminent men that this country has ever produced.

Chief Justice Marshall was elevated from the bar and held no judicial position before becoming Chief Justice of the United States.

Of Mr. Justice Story, Josiah Quincy, jr., said:

I remember my father's graphic account of the rage of the Federalists, when "Joe Story, that country pettifogger, aged 32," was made a judge of our highest court.

On the other hand, John Quincy Adams says:

The Associate Judges from the time of his (Marshall's) appointment have generally been taken from the Democratic or Jeffersonian Party. Not one of them excepting Story has been a man of great ability.

In his "Memoir of Joseph Story, LL. D.," 1868, George S. Hillard says:

Mr. Story, when he went upon the bench, was only 32 years old, a very early and, with the exception of Mr. Justice Buller, an unprecedented age for a lawyer to be advanced to a seat upon the highest judicial tribunal of his country. When we call to mind his youth and remember how earnest and conspicuous he had been on the unpopular side in politics, it will not be a matter of surprise to learn that the news of his appointment fell with something like consternation upon the elder, the more apprehensive, and the more conservative portion of the people of New England. His merits as a lawyer could be scanned only by his professional brethren; his sweet and generous nature could be appreciated only by his friends. The public knew him as an enthusiastic partisan; and it is not too much to say that with many there was an apprehension that, in his hands, rights and property would hardly be safe. It is hardly necessary to add, that the existence of such fears was a striking proof of the truth of Mr. Jefferson's saying, "How much we suffer from misfortunes that never happen." From the moment he assumed his judicial office he shook the dust of politics from his feet, and he bore himself with such absolute impartiality that it is literally true that there was no act of his judicial life from which it could have been known to which of the two great parties which divided the country he had previously belonged.

Roger B. Taney was nominated by President Jackson in January, 1835, to be an Associate Justice.

Chief Justice Marshall interested himself in support of the confirmation.

History records the following:

At the last moment of the session the nomination of Mr. Taney was brought up in the Senate, and was indefinitely postponed, which was equivalent to a rejection.



It is sad to a reflecting man to witness in an august body like the Senate, composed at that time of men who, by their eminent abilities, would give the highest dignity to any legislative assembly in the world, the unreasoning domination of party spirit, making it do an act of which every Member was afterwards ashamed. (*Memoirs of Roger Brooke Taney by Samuel Tyler*, p. 242.)

Chief Justice Marshall died in the summer of 1835, and on December 28 President Jackson nominated Taney for Chief Justice. There was violent opposition, particularly by Clay and Webster. On March 15, 1836, the nomination was confirmed by a majority of 14 votes.

The contest over the confirmation of Mr. Justice Stanley Matthews shows how easily mistaken conceptions concerning the predisposition of a judge upon questions of law or policy may develop into an unwarranted attack upon his moral qualities.

He was nominated by President Hayes early in 1881 on the retirement of Mr. Justice Swayne.

Charles Theodore Greve in his *Life of Matthews* (Great American Lawyers, Vol. VII, pp. 418-420) says:

That his confirmation was bitterly opposed particularly by many in the East is a matter of public history. He had taken a most active part in one of the bitterest conflicts of modern politics and had been most conspicuous among the members of the bar as a representative of corporations and capital. To the objections that might have been urged as the result of mere differences of judgment were added as always happens in such cases the calumnies of personal enemies. Even a most unfair version of the old Connelly case of a quarter of a century before was made to do service. The opposition was sufficient to prevent confirmation during the few remaining weeks of President Hayes's term, but promptly after the inauguration of Garfield he, at Hayes's request, sent the nomination once more to the Senate. The opposition continued for some time but this extraordinary proof of confidence, the selection by two Presidents, each from his own State and each familiar with his entire career, finally led to his confirmation on May 12, 1881. He took his seat upon the bench of the Supreme Court on May 17, and soon came to be recognized as one of its strongest members. Whatever opposition may have been manifested at the time of his nomination was soon shown to be without foundation and those that led that opposition were glad to acknowledge their error. Principal among these was Senator Edmunds, who later bore testimony that "the grounds upon which many Senators (myself among others) thought it unfit that he should be called to this particular public service, turned out to be entirely mistaken, and in the public respect toward which our solitudes were directed, his opinions delivered in this court and his assent to opinions upon that class of questions delivered by other judges, justified the President of the United States in insisting upon his appointment and convinced me, and I think no doubt all the other Senators who were opposed to him at the time, that it was our mistake and not that of the President of the United States." Senator McDonald, also a member of the Senate committee to which the nomination was sent, took occasion to brand as false any insinuations as to his conduct during the crisis of 1876-77, at which time he, McDonald, was one of the "visiting statesmen" on behalf of the Democratic National Committee.

The Connelly case, just referred to, gave ample opportunity for unjust criticism. In 1859, when Matthews was United States attorney for the southern district of Ohio, it became his duty to prosecute Connelly, the reporter of a local newspaper, who was indicted for aiding in the escape of fugitive slaves. Matthews was then believed to be sympathetic with the antislavery cause, and the prosecution was regarded as an unwarranted persecution by many influential citizens.

Another occasion on which Matthews found himself at the point where conflicting principles met was created by a resolution passed by the board of education of the city of Cincinnati, which provided:

That religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the common-school fund.

Suit was brought to restrain the execution of this resolution. Matthews was at the time a pronounced Calvinistic Presbyterian. Nevertheless, he accepted employment to defend the board of education. His biographer says of him:

Matthews's appearance for the defense in this case shows as no other act of his life can show more plainly the liberal character of the man as well as his high conception of a lawyer's duty.

In arguing the case, Matthews said:

It is easy to swim with the tide, to go with the current, to follow in the wake of the multitude. To do things that are popular is not hard. But to stand by a man's individual moral convictions, in opposition not to enemies, but to friends, tries a man. If your honors please, it tries me.

The New York Sun had many violent editorials against Stanley Matthews from January to May, 1881, most of them by reason of his alleged connection with the Pacific railroads or Jay Gould. They appear on these dates: January 27, February 1, 2, 4, 7, 9, 11, 12, 16, 19, March 7, 19, 23, 24, 29, May 12 and 13.

Those of February 1 and 4 refer to the Anderson letters and indicate on their face that Matthews had been the custodian of papers that showed that Anderson had forged false return to get the necessary Hayes count in Louisiana, and show clearly that Matthews after he had this paper in his possession was active in endeavoring to get Anderson a Federal position. Matthews had stated in his testimony before the investigating committee that he understood that this paper was got up for blackmailing purposes, and that Anderson had not in fact been guilty of fraud in connection with the returns. These editorials refer to the committee as a "whitewashing" committee.

The February 7 editorial sets out the virtual trade that was alleged to have been made by Matthews on behalf of Hayes, not to interfere with the local State governments in control of the Democrats in certain States if the filibuster was stopped against the acceptance of the report of the Electoral Commission as to the presidential count. This editorial and some others refer to Mr. Justice Harlan's appointment on the Supreme Court bench as having been a reward for his help in the fraudulent counting in of Hayes.

Stanley Matthews was active in the Hayes-Tilden campaign of 1876 and visited Louisiana as an observer of the count. Subsequently one James E. Anderson made statements which led to an investigation by a select committee of the Senate: Allison, Ingalls, Hoar, Davis of Illinois, Whyte, and Jones of Florida, to determine what connection Matthews had had with real or pretended frauds in Louisiana and any promise of rewards that had been made to Anderson in connection therewith. Anderson was apparently a Republican election officer. They had heard and considered Anderson's

testimony and Matthews's testimony and decided that Matthews's statement was correct; that is, that he had had nothing to do with inducing Anderson to suppress testimony or to give false testimony. But it did appear from Matthews's statement that he had exerted himself to get an appointment in the Federal service for Anderson, apparently merely because he was, in Matthews's view, a worthy and needy Republican. The committee, after absolving Matthews from guilt in any other respect, concludes its report:

\* \* \* We can not but regard his action with respect to James E. Anderson's effort to obtain an appointment to office, under the circumstances, as wrong and injurious to the public interest. (Report, Mar. 1, 1879, vol. 2 of 1879, 45th Cong., 3d sess., S. Rept. 867.)

Thus it may be seen that Mr. Brandeis will not be the first distinguished lawyer to serve upon the Supreme Court of the United States after having been criticized most severely.

It is easy to make charges, and there is too much proof in this case of a preconcerted effort to weaken the power of Mr. Brandeis before the public, to think of permitting insinuations and innuendoes to take the place of reasonable proof. We should be certain to have an honest, capable man upon the bench, but unless one be appointed who has not had the capacity and the courage to take part in the discussions of the last quarter of a century, which have been pregnant with constructive legislation and decisions, as well as undergoing a revolution in public sentiment regarding many questions, then it would be hard to find one, whom either malice or interest could not easily disqualify. For instance, take such an eminent man as Senator Root, now the president of the American Bar Association. We take it that practically every one who has protested against Mr. Brandeis would gladly accept Mr. Root as the kind of a man and the kind of the qualified lawyer who would adorn the Supreme Bench. Yet it is the irony of the present situation that in a report published in 1902 entitled "Root's Record in Philippine Warfare," Mr. Moorefield Storey, who has been most prominent in fighting the nomination of Mr. Brandeis, joined in summing up conclusions, among others, as follows:

That the statements of Mr. Root, whether as to the origin of the war, its progress, or the methods by which it has been prosecuted, have been untrue.

That he has shown a desire not to investigate, and, on the other hand, to conceal the truth, touching the war and to shield the guilty, and by censorship and otherwise has largely succeeded.

Since that time Mr. Root has occupied many positions of trust and responsibility, among them the position of Secretary of State and United States Senator from New York and president of the American Bar Association. His preeminent position as a citizen is a guaranty that nothing which we quote now from Mr. Storey in 1902 can possibly do any injury, but if he had had less prominence and power, and disappointed railroads and other special interests had so desired, the above-quoted report would be certainly as substantial a foundation upon which to build a structure of doubt as formidable, in any view of the situation, as is the one which is now sought to be interposed against the nomination of Mr. Brandeis.

The active life of the people, the bitterness and intensity of political, legal, and civic controversies have made many prominent men the object of attack from large sections of the people or some particular communities. Instances of this could be multiplied, but we do not care to take liberties with others' names, preferring to let the illustration of one of the very distinguished members of the bar, which we have given, and who can not possibly be injured thereby, suffice.

Since 1907 Mr. Brandeis has been the object of bitter attack from those interested in defeating his opposition to the transportation monopoly sought by the New York, New Haven & Hartford Railroad Co. (620, 751, 615, 640, 499, 510). Before this time, his efforts in behalf of what he believed to be to the interests of the community had exposed him to the enmity of other public-service corporations, and the banking interests allied therewith (810, 613, 618).

But it was at the end of 1907 that the systematic efforts to discredit him began. This was done through inspired news articles and editorials, and finally through extensive advertising (620, 640, 664, 239). This was placed to some extent through Clarence W. Barron (134), the editor of a financial paper called the Boston News Bureau, and Wall Street Journal, and some of the advertisements were approved by Mr. Charles F. Choate, jr., the counsel for the railroad and a son of one of its directors (640, 643). This advertising was put out under such headings as "Brandeis the Railroad Wrecker." It was not the sporadic outburst of spite. It was a systematic policy of defamation to break down the power of his opposition, which was effective because of his high repute and could be broken only by attacking his reputation. The method adopted was to spread the idea that he was not acting disinterestedly for the benefit of the community, but under pay and for hostile private interests (640, 660). This is of particular significance when considering the nature of the alleged bad reputation. It is not that he is unfaithful to his clients or false to the courts; it is that he is not entirely "trustworthy" (153), is "ruthless" in the attainment of his objects, and not "scrupulous" in the methods he adopts (271); that he works "under cover" (653); that he is not "straightforward" (611), and not always truthful, and sails under "false colors" (750). This was the very reputation which an extensive and skillful campaign was conducted to give him (620). The meaning of the witnesses is still further defined by their illustrations, namely, that of his being paid by Collier's for appearing for Glavis (614, 269), and the false charge that he was knowingly acting for the New York, New Haven & Hartford Railroad Co. in bring the Corbin suits against the New York & New England Railroad Co. (415).

The coincidence of the beginning of this alleged evil reputation with a systematic campaign to create it is well shown by the testimony of Mr. Peabody, one of the hostile witnesses, who says that he has a wide acquaintance at the Boston bar, and for years has been a member of the same club with Mr. Brandeis, and yet the first that he heard by way of criticism of Mr. Brandeis's good faith was when he attacked the New Haven Railroad Co. in 1907 (753), and this was an attack to which Mr. Peabody was personally opposed (751).

This was an attack, as Mr. Storey says, upon people, many of whom exercised a very powerful influence, socially, politically, and financially, so that a man would not be in high favor with some of the best citizens of Boston who was engaged in exposing the shortcomings of these people (272).

Outside of this small circle and the influences of the hostile campaign, Mr. Brandeis's reputation is not only above reproach but is that of a man who is conspicuous for high standards of action, personally and in his profession.

With 38 years of practice in the Boston bar, Mr. Melvin O. Adams says of his reputation:

If I may analyze it, as I observe it, there is a group of men of high standing, like Gen. Peabody, in the community, who are in the network of State Street, which is our financial street, who state and think that Mr. Brandeis is not straightforward in his practice. I think these opinions, when traced, run into some one of these pockets of more or less publicity, namely, the Lennox case, the United Shoe Machinery case, the wrecking of the New England—those allegations. That is a fair statement as to that group. On the other hand, there is a large body of the bar, who, coinciding with what I have said as to his being a very able lawyer, a man of profound learning, also believe that he is actuated by lofty purposes, is honest and trustworthy (766).

Mr. Thomas J. Boynton, lately attorney general of Massachusetts, says:

That reputation, so far as I know it, is good. Down to the time this appointment was made I think the only thing that had ever come to my attention in any way reflecting upon Mr. Brandeis was certain printed matter circulated by the United Shoe Machinery Co. With that exception, I do not think I ever heard anything reflecting in any way upon his character as a man or as a lawyer (771).

The testimony of Mr. French and Mr. Walker are cumulative on this point.

Of his national reputation, Mr. Stephen S. Gregory, formerly president of the American Bar Association, says that "his reputation is excellent as a lawyer of ability and character" (711).

Hon. Newton D. Baker, Secretary of War, says that he knows Mr. Brandeis's reputation among social workers, and that among them he is regarded as not only the greatest lawyer of their group of aids but as a detached and spiritual and high-minded man (762).

This is emphasized by a memorial in Mr. Brandeis's favor signed by many well-known men (761).

Mr. Whipple, already quoted, says:

As a lawyer, Mr. Brandeis is able and learned. As a man, he is conscientious and high minded. The feature of his career which is the most striking and remarkable has been his unselfish and unswerving devotion to the social, moral, and industrial uplift of the lowly and less fortunate of our people. I believe that on the Supreme Bench of the United States he will exert a strong influence in establishing the ideals to which he has devoted his recent years (282).

It is evident that the standing of Mr. Brandeis's firm in the public esteem can not rise above his own. Mr. Whipple says that it is a reputable firm, generally so regarded, one of the leading firms of the city (285), one to which go men of superior excellence in their work in the Harvard Law School.

Mr. Hutchins says that the firm is one of the high-standing firms of the city to which for 20 or 30 years a good many of the high-class men from Harvard have gone, and that it has done a large and varied

business, dealing on terms of good fellowship and general respect with the entire bar (621).

Without going further into details it may be said that the testimony of Mr. French, Mr. Walker, and others convinces your committee that the high standing of the law firm is not open to doubt.

The unreality of the strictures upon Mr. Brandeis's reputation is strikingly demonstrated by the treatment which has been accorded to him by some of the very men who now make these assertions. Among his critics are several of the overseers of Harvard College and members of that corporation. They are charged with the duty of maintaining the high moral standard of that institution, and of putting in places of prominence only those whose example will be elevating to the student body. Year after year these men have appointed Mr. Brandeis a member of the visiting committee to the Harvard Law School—a committee made up of such men as Mr. Justice Hughes, of the Supreme Court of the United States; Mr. Justice Loring, of the Supreme Court of Massachusetts; Mr. Justice Swayze, of the Supreme Court of New Jersey; Hon. James T. Mitchell, some time chief justice of Pennsylvania; Hon. Robert Grant, judge of the probate court in Boston; Hon. Henry L. Stimpson, some time Secretary of War; James C. Carter, leader of the American bar; Charles C. Beaman, member of the distinguished firm of Evarts, Choate & Beaman, a partner of Joseph E. Choate, lately ambassador to Great Britain; Francis C. Lowell, United States judge for Massachusetts; Charles J. Bonaparte, lately Attorney General; Jeremiah Smith, formerly justice of the Supreme Court of New Hampshire and one of its most distinguished citizens and professor in the law school after 1891; Charles S. Fairchild, formerly Secretary of the Treasury under Mr. Cleveland; Charles P. Greenough, formerly president of the Boston Bar Association; Robert M. Morse, one of the leaders at the Boston bar for the last 40 years; John Noble, clerk of the Supreme Judicial Court of Massachusetts; James J. Storrow, Edmund Wetmore, Henry W. Putnam, William Rand, George Putnam, Langdon P. Marvin, and Chandler P. Anderson.

Some of the members of the board of overseers of Harvard College, which has appointed Mr. Brandeis a member of the visiting committee to the law school, are the following:

Henry Cabot Lodge, Senator from Massachusetts; George F. Hoar, formerly Senator from Massachusetts; Roger Wolcott, formerly governor of Massachusetts; Moorfield Storey, one of the protestants; Francis C. Lowell, United States circuit judge, cousin and former partner of A. Lawrence Lowell; John D. Long, formerly governor of Massachusetts and Secretary of the Navy; William C. Loring, justice Supreme Judicial Court of Massachusetts; Winslow Warren, collector of port under Mr. Cleveland, father of Charles Warren, Assistant Attorney General of the United States; Frederick P. Fish, a protestant; John Noble, clerk of Supreme Judicial Court of Massachusetts and father of a protestant; Robert Grant, judge of the probate court, Suffolk County, Mass.; Robert M. Morse, one of the leaders at the Boston bar for the last 40 years; Solomon Lincoln, formerly a leader of the Boston bar; Moses Williams, a protestant; George O. Shattuck, formerly a leader at the Boston bar; James J. Storrow, Charles R. Codman, Henry W. Putnam, Leverett Salton-

stall, Edmund Wetmore, Louis A. Frothingham, and George Wiggelsworth.

It will not do to oppose the nomination of a man like Mr. Brandeis and then, after a complete investigation, admitting that the charges are not supported, ask that the nomination be rejected because of the charges rather than of their truth. This would be an injustice to the nominee and to the court, and would be out of line with that sense of justice which pervades all classes of people. Having failed in the charges and admitting the eminent ability of the appointee, it would be the manly thing to concede the evident error in making the charges and ask for a confirmation.

#### APPENDIX.

Hon. WILLIAM E. CHILTON,  
*United States Senator, Washington, D. C.*

DEAR MR. CHILTON: I am venturing to write you the impressions of one who has come into this community from without and may perhaps have been able to judge Mr. Brandeis more fairly than it seems to me he is judged here. His friends, as it seems to me, make a great mistake in urging as his chief qualification his views upon social questions and the eminent services he has performed in the public interest. Important as these matters are, their importance does not lie immediately in the direction of qualification for the bench. What is not so generally known is that Mr. Brandeis is in very truth a very great lawyer. At the beginning of his career his article in the *Harvard Law Review* on the right of privacy did nothing less than add a chapter to our law. In spite of the reluctance of many courts to accept this, it has steadily made its way, until now it has a growing preponderance in its favor. All the cases upon this subject concur in attributing the origin of the doctrine to Mr. Brandeis's paper. The promise thus given has been amply fulfilled. One might instance the revolution which his brief in *Muller v. Oregon* achieved in the matter of arguing cases involving the constitutionality of social legislation. The real point here is not so much his advocacy of these statutes as the breadth of perception and the remarkable legal insight which enable him to perceive the proper mode of presenting such a question. Since I came to Cambridge, not quite six years ago, I have had many opportunities of observing Mr. Brandeis, and do not hesitate to say that he is one of the great lawyers of the country. So far as sheer legal ability is concerned, he will rank with the best who have sat upon the bench of the Supreme Court.

As to the charge that he is lacking in judicial temperament and would be a partisan upon the bench, it seems to me that those who urge this know very little about him and base their opinions upon newspaper accounts of the vigorous battles which he has fought as an advocate. Of course the newspapers are not interested in the purely legal side of his activities. Only those causes involving more or less sensational public interest attract general notice. In these causes he has appeared as a vigorous and sometimes radical advocate. But those who conceive him disqualified because of his advocacy of those cases make the same mistake as is made by others who have so often objected to putting sound and well-qualified lawyers upon the bench because they had often been engaged in advocating the cause of great corporate interests. Moreover it is well proved by experience that a great advocate may easily become a great judge also. A notable example is to be seen in the case of Sir Henry Hawkins, the greatest advocate probably of his generation. When he was appointed to the bench fear was expressed that he would carry his habits of advocacy into the judicial station. On the other hand, when he retired it was universally acknowledged that he had been a fair and sound trial judge in the very class of cases in which he had so often been engaged in the forum. One might instance also the late Lord Russell, easily the greatest advocate of his time, who filled acceptably the post of Chief Justice of England. In the case of Mr. Brandeis the very qualities that have made his advocacy so effective would,

I think, make his study of a controversy as a judge equally effective in achieving a sound legal result.

As to the charges of unprofessional conduct which are so much in the air here, I have no first-hand information. But I may call your attention to one circumstance which seems to me conclusive. At least from 1910 (when I came here) to the present Mr. Brandeis has been one of the committee appointed by the board of overseers of Harvard University to visit the law school. That is, the board of overseers have appointed him as one of a committee to inspect the work of teachers and students, and to advise as to the conduct of the school. At different times between 1910 and the present he has been associated on this committee with Mr. Justice Hughes, of the Supreme Court of the United States; Mr. Justice Loring, of the Supreme Court of Massachusetts; Mr. Justice Swayze, of the Supreme Court of New Jersey; Hon. James T. Mitchell, sometime chief justice of Pennsylvania; Hon. Robert Grant, judge of the probate court in Boston, and Hon. Henry L. Stimson, sometime Secretary of War. During this period, in which Mr. Brandeis has been reappointed from time to time to serve with lawyers of the caliber of those just enumerated, the following lawyers have been members of the board of overseers by whom he has been so reappointed: Hon. Henry Cabot Lodge, United States Senator from Massachusetts; the late John D. Long; Mr. Justice Loring, of the Supreme Court of Massachusetts; Hon. James T. Mitchell, sometime chief justice of Pennsylvania; Mr. Justice Swayze, of the Supreme Court of New Jersey; William A. Gaston, Esq., of the Boston bar; Robert F. Herrick, Esq., of the Boston bar; Frederick P. Fish, Esq., of the Boston bar; Judge Robert Grant; and L. A. Frothingham, Esq., of the Boston bar. It can not be that these gentlemen would have appointed him along with such colleagues to a position of such importance had they then believed him deficient in professional honor or guilty of professional misconduct. Nor can it be asserted that the eminent members of the Boston bar who participated in the appointment and reappointment were ignorant of what is now charged, for these charges are not new. Conceding, as one must, the absolute sincerity of these gentlemen one is driven to the conclusion that the objections now urged against Mr. Brandeis at the Boston bar by his colleagues are the unconscious product of fear of his political views and aversion to his social and public activities.

Yours, very truly,

ROSCOE POUND.

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SOMERSET CLUB,  
*Boston, March 21, 1916.*

To the CHAIRMAN OF THE SENATE JUDICIARY SUBCOMMITTEE,  
*Washington, D. C.*

DEAR SIR: Having followed with interest the report of evidence submitted to your committee in regard to the President's nomination of Mr. Brandeis for the Supreme Court vacancy, I find myself impelled, as a personal friend of his early partner, Mr. Warren, and as one of a now older group of Boston and Harvard men who have watched Mr. Brandeis's legal career develop from its commencement, in usefulness and distinction—to say that while well acquainted with the views of those who now oppose his confirmation and giving weight in other matters to the opinion of some among them, I believe them to be prejudiced and wrong regarding this.

Mr. Brandeis is a man of keen intelligence, but high ideals, possessing also a rare creative quality of imagination that, combined with fearless courage of convictions, has brought him at times, to the public benefit, in conflict with vested interests and established points of view. We need such a man as this on that high bench to keep it open to the ever-changing thought and sentiment of the world and Nation, recognizing these in their changes and passing judgment on them through the decisions that it renders.

I trust accordingly, for the country's sake, that the Senate may confirm his nomination. And I remain, with respect,

Very faithfully, yours,

GEORGE B. DORR.



THE COMMONWEALTH OF MASSACHUSETTS,  
PUBLIC SERVICE COMMISSION,

February 26, 1916.

HON. WILLIAM E. CHILTON,

*Chairman Subcommittee on Brandeis Appointment,  
United States Senate, Washington, D. C.*

DEAR SIR: I have followed the press accounts of the hearings before your subcommittee in the Brandeis matter with a great deal of interest. After it has probed his record to the bottom, as I hope it will, I feel very sure that the committee will favor his confirmation. My confidence does not rest upon what others have told me about him, but upon personal knowledge.

Before I became a member of the Public Service Commission of Massachusetts I was, for some years, secretary of an organization in Boston known as the Public Franchise League. It was made up of a group of business and professional men of standing, who thought that they could be of service as citizens by making a disinterested study of some of the important questions that arise from time to time in regard to the public-service corporations of every community and by presenting the results of their study to the public bodies which have to deal with these questions. Mr. Brandeis was one of the members of this league and I saw a great deal of him and worked with him intimately.

If your committee would care to have it, I should be glad to furnish you with a statement, in some detail, of what this league did in connection with street railway, railroad, gas, and electric matters, for its work was, in my judgment, of great public importance and value. It would also help you, I think, to understand the attitude which Mr. Brandeis has taken upon such public questions and the antagonisms which have been aroused. As you probably appreciate, it is impossible in a conservative community like New England for a man to speak plainly in the public interest upon such questions (especially if he also speaks forcefully) without creating enemies, some of whom are sincere but influenced by a prejudice which is often quite unconscious.

Louis D. Brandeis is a man of very unusual ability and power and a man of great moral courage. Furthermore, he is an indefatigable worker and student. The impression which some have that he is merely a brilliant advocate and addicted to reckless and extreme statements is not warranted. I have never known him, in any matter in which I was associated with him, to take a position before he was well grounded in the facts. This was particularly true in the New Haven Railroad matter. That he is honest and sincere I think no one who really knows him will doubt. I have no hesitation in expressing the opinion that he will make a very valuable addition to the Supreme Court, and I believe that you will feel the same after you have completed your investigation. My own feeling is illustrated by the fact that since I have been a member of this commission I have frequently consulted with him upon important matters.

It is, I think, hardly necessary to say that this letter is not an official communication, but the expression of my personal views.

Yours, very truly,

JOSEPH D. EASTMEN.

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate,  
Washington, D. C.*

DEAR SIR: It is my desire to record my indorsement of Louis D. Brandeis, who is nominated as Associate Justice of the Supreme Court of the United States.

I have been a lawyer in active practice in the city of Boston more than 21 years and have been district attorney for more than 6 years. Previous to that time I served as civil service commissioner for the Commonwealth for 4 years and have held other nonelective public positions.

I want to speak of Mr. Brandeis's reputation at the Suffolk bar. I note that, according to the press, a gentleman recently claimed to represent the bar association of the city of Boston, of which I have been a member for many years. While as an officer he may have certain rights, or some committee may have given him authority, I want to call your attention to the fact that no meeting of the bar association has been held and the matter of Mr. Brandeis's indorsement has never been considered by the body as a whole.

I believe that in my private practice and in my official capacity I have been in a position to know much about the bar and the standing of its members.

Few men come in contact with more men in active practice, and, as you will appreciate, it is inevitable that the estimate of members of the bar, one toward the other, soon becomes known and a matter of current gossip, criticism, or praise. I have never heard the slightest criticism of Mr. Brandeis, but, on the contrary, he has always been admired and looked upon as one of our most brilliant trial lawyers and one of the best jurists at the bar, learned in the law, and skilled in its practice. I never have heard the slightest intimation that he was anything but honest and upright, as he is capable and energetic. He has never hesitated to take a strong public position on public matters and it is never difficult to place him.

He seems to have been a man who always had an ambition to do something to better the conditions of the people.

It is not unusual for a man of his large experience and long years of turmoil in the courts and out to have displeased many, and perhaps offended them very deeply, and this is true of any man of his years and of his activity.

I am confident that if a vote of the Boston Bar Association were to be taken, or if a vote of the members practicing at the Suffolk bar, many of whom are not members of the association, was to be had, Mr. Brandeis would receive almost a unanimous vote, and, regardless of individual feelings, the lawyers would in-dorse him as an honest man, well fitted by training and experience to hold a place on the bench of the Supreme Court of the United States.

I have seen in the press a protest against the appointment of Mr. Brandeis signed by some members of the Suffolk bar. These are all estimable men, but almost without exception men of one class and one kind. I see there few names of the active trial members of the bar. I see there few names of men who have had to struggle to attain success. I see there few names of men engaged in general practice. This is not to be taken as any reflection upon these men, but merely as calling your attention to the fact that the list of names which I saw published was far from representative of the Boston bar, where we have all races and creeds, whose opinion is worth while and whose standing is beyond question and who are perhaps much nearer to the people than those in the list I have mentioned.

I do not want to accuse anyone in particular, but I think I express the notion of the majority of the people of Boston when I say that there is a feeling that the underlying opposition to Mr. Brandeis is more because he is a Jew than that he is unfit by reason of anything he has ever done. I know that your committee will have this in mind and that such a thought and such a reason will have no harbor and no merit in your honest consideration of this case.

Very truly, yours,

JOSEPH C. PELLETIER.

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WASHINGTON, D. C., *February 7, 1916.*

MY DEAR SENATOR WALSH: It seems to me a public duty to write to you in regard to the appointment of Mr. Louis D. Brandeis, of Massachusetts, as a Justice of the Supreme Court of the United States. During the two years I was governor of Massachusetts, and in the years preceding them, I had repeated occasions to observe this man and his high ideals and common sense; his wide practical knowledge of the law; his extensive understanding of the business, economic, and social problems of our time; his sound judgment and ardent devotion to the public welfare. As you know, we are justly proud of the number and ability of our public-spirited men in Massachusetts, and it would be difficult to point out a better example of generous, unpaid, diligent, constructive work upon the side of the public interests than that which has been done by Mr. Brandeis.

On numerous occasions, beginning at least as far back as 1896, whenever the creation and control of the Boston subways was before the legislature, he has been, as a private citizen, a tireless and successful leader against powerful opposition in support of the principle that the value of the subway franchises should be kept for the public after giving to the operating company a reasonable return for services rendered. He declined to accept any compensation for his long-continued and very valuable constructive work during all these years in this cause.

When the gas situation in Boston appeared to be in a hopeless condition he urged, again as a private citizen, the plan by which the dividends of the gas company were made dependent u

This has resulted in a reduction of the price of gas to the public and in a corresponding increase in dividends to stockholders of the company.

When the insurance investigations occurred he devised and successfully pressed for legislation in Massachusetts permitting, for the first time in this country, our savings banks to issue small-payment life insurance policies. This has resulted in an opportunity for our working people to insure themselves at much lower rates than were being charged by the industrial insurance companies, and has led these companies to make lower rates. To my personal knowledge Mr. Brandeis has given annually thousands of dollars to further the work of bringing to the working people of our State this opportunity for less costly insurance. For more than 20 years prior to the Massachusetts law there had been no reduction in the cost of industrial insurance, but since the passage of the law so successfully advocated by Mr. Brandeis in Massachusetts the premiums of the old-line companies have been reduced, on an average, 20 per cent, thus saving to the people of this country, insured in industrial companies, from \$15,000,000 to \$20,000,000 annually, and to the people of Massachusetts about \$1,000,000.

The system of arbitration which he devised for the New York garment workers is an equally significant example of his judicial qualities and his public service in other fields.

In 1906 the people of New England began to awaken to the fact that the New Haven Railroad was apparently successfully seeking to create a New England transportation monopoly. The event which focused public opinion most sharply was the acquisition of the controlling interest in the Boston & Maine Railroad. Mr. Brandeis, again as a private citizen, commenced an exhaustive study of this railroad problem and made public an analysis of the financial condition of the New Haven Railroad, pointing out, for the first time, to the people of New England the inevitable disaster sure to result from the course of mismanagement and waste then being pursued. His advice was unheeded, his warning derided, and his motives impugned. But time has shown that his conclusions were based upon carefully ascertained facts, to which he applied the clearest and most cogent reasoning power. Three years ago what he prophesied nine years ago became apparent to all and is now a matter of public knowledge and of record in Senate documents and elsewhere.

I instance these among many public services covering a long period of years as illustrative of the work done as a private citizen in the service of the public interest without compensation, at a large expenditure of his own time in the midst of a very active professional life.

Indeed, in extensive acquaintance with public men, I know of no one who without emolument or honors of public office has given so much of the valuable constructive service of a trained lawyer to the public weal as Mr. Brandeis.

I have written mainly of Mr. Brandeis's public work for the past 20 years, but I would not have you overlook that, before he engaged in these public activities out of which have grown results for which he is entitled to the gratitude of the American people, he had achieved already a position at the Massachusetts bar which would well have warranted his appointment to the Supreme Court at the age of 40. He is a great lawyer and a great citizen. Is not this a combination for a great judge?

Were I not hastening on a far journey I would seek a personal interview with the committee, but failing such opportunity I venture to emphasize and perhaps to repeat some of the things I said to you orally; and I hope that you will communicate them to your committee, together with my very best respects.

Very sincerely, yours,

DAVID I. WALSH.

HON. THOMAS J. WALSH,  
*The Senate, Washington, D. C.*

FEBRUARY 1, 1916.

TO THE MEMBERS OF THE JUDICIARY COMMITTEE  
OF THE UNITED STATES SENATE.

GENTLEMEN: I have practiced as a member of the Boston bar ever since the admission of Louis D. Brandeis. I have known him well and watched him with interest through all these years, though not connected with him in any

way. If confirmed by the Senate, as I have no doubt he will be, I am satisfied he will be an acquisition of the highest value to the Supreme Court. His mind is clear, analytic, exact, incisive, and sound. There is in my acquaintance no surer, saner, more exact and reliable mental machinery than is found in him. I know of no lawyer anywhere who could better assist in the correct solution and conclusion of the involved legal propositions coming before our highest court than Mr. Brandeis. He is versed in nearly all departments of the law. He is acquainted with all sections of the country. He knows all human conditions and has regard for them. His purpose is noble and untrammelled. His spirit and habit are modest, considerate, and kind. He is never obtrusive, but he never hesitates to take the consequences of his convictions. He accomplishes an enormous amount of work in a day, and he is ripe in wisdom, sense, and courage.

Mr. Brandeis is thoroughly judicial in temperament and habit. He is never hasty or extreme, but is calm, mathematical, incisive, and careful in his ready reasoning. His judicial analysis and conclusion in the numerous public issues with which he has been connected are often taken as controversial, because he sees the wrong sooner than others do, and then lays it bare to the world's inspection in the succinct, clear, unanswerable terms which the courts employ. His words are few; he never reiterates. He enunciates propositions which the courts and laymen adopt.

I have never known Brandeis to be assailed, except for turning on the truth. For instance, in the conduct of the New York, New Haven & Hartford Railroad all the Attorneys General, district attorneys, and administrators of Governments in the three States traversed by the railroad knew for years that the corporation was proceeding ultra vires and regardless of law. By enormous expenditures it quieted agitation, and New England thought it well enough for that railroad to be superior to law. Finally Mr. Brandeis alone made plain that its unlawful monopoly and wasteful aggrandizement were bringing financial ruin as well as moral abasement; that from \$100,000,000 to \$250,000,000 had been lost in its unlawful courses; and that all would yet be lost unless the policy were changed. The stockholders of that corporation are to-day indebted to Mr. Brandeis alone for effectuating the halt and turning about which have saved them whatever value they have left in the New Haven Railroad. For his stand against ruination, voluntary to be sure, some writers, like the editor of the Boston News Bureau, who received \$104,000 from the railroad company to place among newspapers for advertising, have defamed Mr. Brandeis shamefully and relentlessly, claiming he ruined the credit of the road, whereas he saved the remnants of its value for restoration by a law-abiding management.

The Supreme Court and the country, now that the opportunity is given, should have the benefit of this plain, sincere, and remarkable personality in the position for which he is most signally qualified. Massachusetts could not make a better contribution to any department of the Government.

Respectfully, yours,

A. S. HALL.

FEBRUARY 18, 1916.

Senator WILLIAM R. CHILTON,

*Chairman Subcommittee, United States Senate,*

*Washington, D. C.*

MY DEAR SENATOR: This letter is written to urge the confirmation of Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

To identify myself to your committee, in order that you may know what opportunity I have had to pass upon the qualifications of Mr. Brandeis, I would say that I have been a member of the bar, practicing in Boston, for the past 18 years; in politics I am a Democrat and have served in the Boston city council, Massachusetts House of Representatives, and the Massachusetts Senate, and have been register of deeds for Suffolk County since 1907. I was president of the democratic city committee of Boston from 1902 to 1905, inclusive, and a vice president of the democratic State committee for several years. I was a delegate to the National Democratic Convention at St. Louis in 1904 and an alternate at the Democratic National Convention in Baltimore in 1912.

I first met Mr. Brandeis 20 years ago, when I was a delegate to the Boston Municipal League, an organization composed of representatives from many

improvement societies and other bodies who were interested in improving the civic welfare of the city and obtaining better laws for the benefit of the whole people and opposed to any privileged class, political or otherwise.

I recall that Mr. Brandeis was counsel for the league and had done considerable work for the organization, and I remember distinctly that it was a great surprise to me as a law student at that time when Mr. Brandeis presented to the league a receipted bill for \$500, with his compliments, and declined to receive any compensation whatever or to make any use of the appropriation that had been made for counsel fees.

On many occasions since that time I know that Mr. Brandeis has acted in behalf of the public, and has represented civic and charitable organizations without compensation. I have seen him in action before legislative committees and at great gatherings of citizens discussing public questions. I have seen him in court in the trial of cases and I have never known a man that possessed a keener or more logical mind. I consider him the equal, if not the superior, of any man at the bar in this part of the country.

At a meeting of the Boston City Club about two years ago Mr. Brandeis made the ablest presentation of an antitrust argument that has ever been heard in this city, and it was the unanimous opinion of the members of all shades of political opinion that no more scholarly or logical address had been made at the club during its history, and our speakers have included Presidents Wilson and Taft, Hon. William J. Bryan, Hon. Champ Clark, many United States Senators and Congressmen, Cabinet officers, the governors of many States, college professors, eminent pulpit orators, and many leading lawyers of the United States, as well as members of the English Parliament.

At the dinner that preceded this address at the City Club brief speeches complimentary of Mr. Brandeis were made by representative citizens of Boston, and as a vice president of the club I was asked to speak. I said that I agreed with all the speakers, and with the entire community in fact, that Mr. Brandeis was an exceedingly able lawyer and a good citizen, but that I had been trying for many years to make up my mind whether he was a deep-dyed schemer, who had been carefully laying his plans to become mayor of Boston or governor of Massachusetts, or whether he was simply an honest man.

I felt that the time had come to make a decision, and, inasmuch as he had stood the test for nearly 20 years and had not declared himself a candidate for office, I had come to the conclusion that he was simply an honest man, sincere in all his endeavors in behalf of the common people, and that he had absolutely no ulterior motive in devoting his magnificent talent on many occasions to the public without compensation. I still adhere to that opinion, and believe that his confirmation would add great strength to the Supreme Court.

Many a man is loved for the enemies he has made, and I believe that Mr. Brandeis is to be congratulated for some of the enemies he has made, although there may be a few of his opponents who sincerely believe his confirmation unwise, but I think they do it because they can not see outside of their own sphere of influence and because Mr. Brandeis has attacked their interests.

These men, however, do not represent the general opinion of this community, and I have no doubt that a poll of the citizens of Boston would be overwhelmingly in favor of the confirmation of Mr. Brandeis.

Respectfully, yours,

W. T. A. FITZGERALD.

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[Lionel Norman, attorney and counselor at law, 200 Devonshire Street.]

BOSTON, February 19, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I understand that you are chairman of the subcommittee having the matter of the confirmation of Louis D. Brandeis for the Supreme Court of the United States under consideration. While my law practice in the past has not been an extensive one, still I have had more or less trust matters, involving large sums of money, to attend to, and in this connection have had some contact with Mr. Brandeis's firm. One case involved a matter of \$168,000, which was referred to Mr. Brandeis personally. The matter was dealt with in a manner showing great integrity and consideration, when it might easily have been dragged out for years and cost the estate a great deal of money. The fee

charged to the estate and the whole attitude in the premises made a very deep and favorable impression upon me.

Outside of the few hereabouts in Boston who represent what we call "God's own anointed," but who do not always practice God's precepts, Mr. Brandeis is regarded as a man of very high principles as well as of very great ability and deep legal learning. Possibly, if there is any criticism of him which I might be inclined to make, it would be that instead of being overpractical, as he has been accused of, he is too idealistic.

Yours, very truly,

LIONEL NOEMAN.

BOSTON, *February 1, 1916.*

Senator W. E. CHILTON,  
*Washington, D. C.*

DEAR SIR: I see from the daily papers that you are the chairman of the Senate committee which is to inquire and report as to the advisability of confirming the nomination of Mr. Brandeis to fill the vacancy in the Supreme Court.

Having known Mr. Brandeis as a student at the Harvard Law School in 1876, watched his career as a lawyer, and having lived in Boston for the past 12 years, I desire to urge your committee to recommend his confirmation.

Mr. Brandeis was certainly one of the leading men, if not the leading man, in his class at Harvard, and since his admission to the bar in Boston has gradually forged his way to the front until he is now, and for several years has been, recognized as one of the ablest lawyers in this city. His standing as a man and as a lawyer is the best, but like all leading men in his profession has necessarily made some enemies in attaining his present position. He is a lawyer who thinks for himself and is not afraid to express his convictions, and who realizes that the law must grow to fit existing conditions rather than undertake to apply precedents which have arisen out of conditions which no longer exist to present-day problems.

I hope you will find it consistent with your duty as a Senator to vote for and urge his confirmation as a member of the Supreme Court, as I confidently believe that the appointment of a man of his ability and character to the Supreme Court at this time is both wise and judicious.

Very truly, yours,

J. M. HEAD.

FEBRUARY 23, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I address you as chairman of the subcommittee on the question of confirming the nomination of Louis D. Brandeis, Esq., to the United States Supreme Court. If it is proper at this time to make a statement of opinion, as many eminent persons have recently done pending the investigation, let me say that I was in the law school with Mr. Brandeis and knew him well, and have kept up a friendship with him ever since.

Of late years I have retired from active practice and wholly withdrawn the last four years. I have, however, followed his course with great interest, have the highest opinion of his intellectual and moral qualities, and would not hesitate to entrust my affairs in his hands, feeling sure that if I did so he would look after them with the greatest intelligence and loyalty, and I believe his large knowledge of sociological questions would be of distinct benefit to the Supreme Court. Believe me,

Respectfully, yours,

RICHARD H. DANA.

FEBRUARY 16, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Chairman Subcommittee,  
Washington, D. C.*

DEAR SIR: I am glad to support the nomination of Louis D. Brandeis. I believe that he is an accomplished, able lawyer; that he has been zealous and faithful in his office as attorney; that he is in every way trustworthy and reliable and eminently qualified for the office of justice of the Supreme Court of the United States.

Very truly, yours,

JOHN W. CUMMINGS

## COPY OF RESOLUTIONS ADOPTED BY TAUNTON BAR ASSOCIATION.

[Prepared by Silas D. Reed and Louis Swlg.]

Whereas the due consideration and formal expression of the Bar Association of the City of Taunton is proper and becoming upon such subjects as may specially and intimately concern the profession of the law, the said Bar Association of the City of Taunton at a special meeting and after due notice, in which was included reference to the subject of these resolutions—

*Resolved*, That it unqualifiedly and unreservedly indorses Louis D. Brandeis, Esq., of Boston, for appointment to the Supreme Bench of the United States. We regard that Mr. Brandeis's learning in the law, his training in its science, and his wide and reputable experience with men and affairs, eminently and becomingly qualify him for the honorable and learned service demanded of the justices of the Supreme Bench. We also voice the opinion that Mr. Brandeis eminently represents the spirit of the times and the democracy of the age. Popular government has a right to expect that such expression be represented in the judiciary as well as in the executive and legislative: Be it further

*Resolved*, That an attested copy of these resolutions be sent by the secretary of the association to the Senate of the United States, and that they be entered upon the records of the association.

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Chairman Subcommittee,**Washington, D. C.*

DEAR SIR: I hope that the nomination of Mr. Louis D. Brandeis to the office of Justice of the Supreme Court of the United States will be confirmed. He is an able lawyer in good standing, and he has the confidence of the community.

Respectfully, yours,

CHARLES R. CUMMINGS.

FEBRUARY 26, 1915.

Senator WILLIAM E. CHILTON,

*Subcommittee, United States Senate, Washington, D. C.*

DEAR SIR: Apropos of the appointment of Mr. Louis D. Brandeis, of Boston, for Associate Justice of the United States Supreme Court, I feel that I should be remiss in my duty as a citizen of this Commonwealth were I not to say at least a word of commendation and assist the good cause so well begun by His Excellency the President.

I have known Mr. Brandeis for 30 years and have had ample opportunity to study him at close range. Having been a public servant, in that I served in the governor's council several terms, and was lieutenant governor of the Commonwealth of Massachusetts, I feel qualified to judge of the pulse of the people with regard to public officers. Consequently, I feel safe in saying that the appointment is one of the greatest acts which the President has done yet, to show that he intends to have as servants of the great American public, men who really will serve the public. The general public feels that no wiser move for the advancement and behalf of the so-called common people has yet been made by His Excellency.

Again I beg to state that I heartily indorse the appointment, and trust that no petty opposition arising from the disgruntled opponents whom Mr. Brandeis has unmercifully beaten in litigation will stand in the path of so worthy an appointee.

Sincerely, yours,

E. P. BARRY.

FEBRUARY 10, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Washington, D. C.*

DEAR SIR: This letter is intended as an indorsement of Louis D. Brandeis, who has been nominated as Associate Justice of the Supreme Court of the United States.

I may be identified as a lawyer in practice in Boston for 35 years and more, who is and has been a Republican, and who was United States attorney for

this district in 1905-6, resigning then by choice and not by request while there was a Republican administration at Washington.

I have known Mr. Brandeis since he was called to the bar and I became then and have remained through the continuing years his friend and admirer.

I have differed from him in many questions of politics and policy.

I do not recall that I have ever been associated with him in legal matters and causes, but I am sure he has many times represented interests which were adverse to those for which I appeared.

I have naturally known many men and many lawyers, but he to me seems supereminent in so ordering his life that with his splendid mental equipment and his great acquisition of learning there were always time and energy to recognize and pay his obligation to the State and the people as he in his vision saw it.

Of course, one can not assert that he has high judicial qualities without a trial, but of such as he great judges have been made, and therefore I think he should be confirmed. I am,

Very respectfully, yours,

MELVIN O. ADAMS.

FEBRUARY 24, 1916.

WILLIAM E. CHILTON, Esq.,

*Chairman of Subcommittee of the United States Senate,  
Washington, D. C.*

DEAR SIR: I have read with dismay the press reports of the testimony given by Moorefield Storey and Hollis R. Bailey before the subcommittee of the Senate regarding Mr. Brandeis. In view of my knowledge of Mr. Brandeis it did not seem to me possible that these men and others would unite in an effort to prevent his appointment to the Supreme Court and to go to the limits they have gone in maligning him. I am thoroughly convinced that the ring behind this fierce and totally unwarranted opposition to Mr. Brandeis are the representatives of predatory wealth and vested interests, and those who are not directly the representatives of these interests have been influenced in their course by these interests.

My familiarity with conditions in Boston, where I have lived all my life and where I have actively practiced law for more than 15 years, convinces me that this chain of men and interests opposing Mr. Brandeis has been forged together from links which have been closely united for generations in this Commonwealth. These men think more or less alike and have a common purpose. Their thoughts and purposes have been in direct conflict with Mr. Brandeis's thoughts and in direct opposition to the purposes which Mr. Brandeis has made the precepts of his life. The present opposition to him is due entirely to the fact that he has been a vigorous opponent of their interests and that he has laid bare their business methods in a way which did not put them in any very enviable light. It is now their purpose "to get back" at him, and that weight should be given to their testimony (especially in so far as their testimony merely gives their opinions, and that is all the testimony seems to amount to) as would be given to anyone's testimony who has been injured and who has thereby become vindictive.

Their opinions of Mr. Brandeis are entirely unfounded and their testimony as to his standing and reputation is entirely conjured up as the result of their bitter feeling against him. The young men practicing law in Boston have held him up as the ideal of what a lawyer should be—courageous, honest, faithful, and zealous in representing his clients, and in the performance of his duties as a citizen most unusual and unselfish. The accusation that he does not think honestly is to me so absurd, so unwarranted, in view of his public acts and of his splendid accomplishments in the public's behalf, that it seems incredible that men of any type can even give utterance to, let alone think, such things about Mr. Brandeis.

The accusation that the majority of the bar or of a very large number of the bar in Boston have no faith in him is to me the most astounding charge, in view of the fact that his office is now, and has been for years, one of the most prominent law offices in this city, and that Mr. Brandeis's firm is constantly coming in contact with numbers of members of the bar. I have yet to hear any lawyer call the conduct of Mr. Brandeis or his associates to account, except in



those instances which have already been made public and which have been known for years. As to these accusations it should be borne in mind that every lawyer's conduct is capable of being misinterpreted. A lawyer is frequently placed in a position where it is difficult for him to know what to do, and where his conscience is the sole test as to whether he has done his full duty to all concerned. This must necessarily be the situation in the cases in which Mr. Brandeis was called upon to represent the apparently harmonious, but to some extent, conflicting interests. Those who know Mr. Brandeis as I do feel that he has conscientiously fulfilled his duty as he saw it to all concerned. Unfriendly persons are likely to misinterpret his conduct in that regard. To my mind the lawyer who endeavors to reconcile the apparently conflicting interests, thus preventing wasteful and annoying litigation, serves all interests best and renders at the same time a great public service. There are many times when it is unwise for him to attempt such a course, but when all parties consent and the lawyer does his best for the time being, if all his foresight and sense of justice fail to accomplish this purpose, is he to be condemned for it?

The accusation that Mr. Brandeis is the sort of man who would betray his clients is not borne out by anything which I have ever heard of him from his numerous clients, many of whom I know intimately, who are substantial business men and have been his clients for years. They have to a man always spoken of him in the most praiseworthy way.

I feel certain that if any of the men who have testified before the committee had been present at any of the gatherings at which Mr. Brandeis was either a speaker or a guest and saw the wonderful receptions which he received from people of every walk in life, from the humblest to the most prominent, that not even their vindictiveness would have given them the courage to have given the testimony before the committee which they gave. I have never witnessed more genuine enthusiasm of a public man anywhere than I have witnessed at large gatherings at which Mr. Brandeis was either a speaker or a guest. I have heard men in every walk of life praise Mr. Brandeis in terms which, in his presence, I am sure frequently embarrassed him, and it is inconceivable that the man who has the "reputation" which has been testified to before the committee should be so lauded and praised.

I was attorney for one of the creditors in the Lennox case, and I was active in that matter. There was nothing in the Lennox case with which any creditor or any party interest could complain of as against Mr. Brandeis. If he purported to represent "the situation" (which is not uncommon practice), he and his associates did it in a masterful and an entirely proper way. This is attested by the fact that for months after Mr. Nutter was appointed common-law assignee, and months after the involuntary petition was filed, not a single creditor made a move to ask for the appointment of receivers to take the place of Mr. Nutter or to serve with him as receiver, which they had a right to do. It has been suggested that the filing of the involuntary petition by Mr. Brandeis's office was not proper. If an involuntary petition had not been filed by Mr. Brandeis's office I feel quite certain, from what I know, that others would have filed such a petition, and, as a matter of fact, the records will show that two other petitions were filed after the petition was filed by Mr. Brandeis's office.

It is my opinion that every attorney including those who have testified against him would trust Mr. Brandeis and his office to keep any agreement which he or any of his associates would make. I have heard judges of our courts speak of Mr. Brandeis and his associates in the very highest terms, and I have never heard any attorney outside of this small coterie say anything derogatory of Mr. Brandeis or speak of him in any terms except the highest. There is a feeling here in Boston that if you want to know what an attorney thinks of Mr. Brandeis you must first find out what his affiliations and associations are. If they are with the type of lawyers who testified against him the chances are that they will stand with Mr. Storey and Mr. Bailey. If on the other hand, they are with the every day lawyer who does not represent vested interests, large corporations, or predatory wealth or the so-called "Back Bay crowd," I am quite sure that to a man they will stand with Mr. Brandeis and urge his appointment. The latter class constitutes by far the great majority of the bar, and with them Mr. Brandeis's reputation is to be envied.

I have felt that the real issue before your committee is not Mr. Brandeis's character, his standing, his reputation, or his ability, but as to whether Mr. Brandeis's service to the people of the country shall be condemned and as to whether the powerful interests behind the opposition shall be condoned for their wrongful acts. Shall Mr. Brandeis, who has altruistically given his efforts for the welfare of the rank and file of the country, be crucified so that the opposition may say to men of his type, "there hangs the man who was broken on the wheel because he attacked us"? Shall the Senate of the United States say that dishonest business, those who violated trusts and who break laws, may continue in their course, and those who attempt to interfere with them are doomed to destruction?

Mr. Brandeis's works are milestones in the progress of the country. He has labored to make the law a living, vital force for the equitable benefit of all and he has tried to correct it as a force which serves only a few and makes the public subservient to their interests. His grasp of government, his understanding of the conflicting social and economic forces, his genuine sympathy for all mankind, his extraordinary experience, his prodigious capacity for work can not but help make him one of the greatest judges of all times. If the Senate rejects him, I am satisfied that the great majority of the bar and the public will feel that the Supreme Court will have lost the services of a great man, one of the greatest of our time.

Yours, very truly,

ARTHUR BERENSON.

CRAIG HALL,  
*Atlantic City, N. J., March 13, 1916.*

DEAR SIR: The day you left Atlantic City I called at the Dennis to say a few words on the matters about which I am now writing.

I wanted to say that I hoped Mr. Brandeis would be confirmed, for I have had a casual acquaintance with him dating back 35 years. I attended a part of the hearings in Washington and heard the evidence in the New England Railroad, the Warren Will, and the United States Shoe Machinery cases. Judging the other allegations by these, I did not see any need to hear them. From what I heard in the above cases I rated the testimony as simply the whining of whipped dogs.

My brother, who has just retired from 40 years of law practice at Boston to our old plantation in Alabama, was in the Harvard Law School with Mr. Brandeis and knows his record in Boston. He has written an open letter strongly urging his confirmation.

The Boston & Maine and the New Haven Railroads were looted by a group of lawyers, bankers, and promoters in Boston with strong copartners in New York. It is these men who are the real opponents of Mr. Brandeis. I know personally a majority of the Boston lawyers who appeared before the Senate committee, and they were simply responding to their personal environment. The same may be said of President Lowell of Harvard, who, I have the strongest reasons for believing, did not represent the prevailing sentiment of Harvard alumni when he signed the protest of the Boston lawyers against the confirmation of Mr. Brandeis. The Harvard sentiment on that point is expressed in an editorial in the New Republic of February 26. A copy of this I have sent to the Senate committee.

If the Government shipping bill ever reaches the Senate I hope that will pass. The shipping question I have studied for a number of years, because I had an interest as a shipper in that direction. I do not believe under world conditions of to-day that we can build up a merchant marine without the aid of the Government's credit. Our private capitalists are nearly all associated with the foreign ship monopoly that is fighting the bill. That makes any new private shipping concern almost an impossibility. The plan of aid provided in this bill seems to me much better than that of granting subsidies. My reasons for that position you will find stated in my remarks before the House Committee on Merchant Marine.

Yours, truly,

THOMAS P. IVY.

To United States Senator OSCAR W. UNDERWOOD,

*Washington, D. C.*

BOSTON, February 23, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I write this letter to urge the confirmation of Louis D. Brandeis, who has been nominated as Associate Justice of the Supreme Court of the United States.

I feel it my duty to address you because I am a lawyer in practice in Boston for more than 30 years and am still in active practice here. I have known Mr. Brandeis during the entire period.

It may be proper for me to state that I was for some years connected with the district attorney's office in this county, and, after that, before entering into general practice, was for some years first assistant city solicitor of the city of Boston.

I have always considered and now regard Mr. Brandeis as a man of great intellectual attainment of the highest character, whose motives are pure and noble.

It would be impossible for a man who has taken such decided stands and expressed what in this conservative end of the world may be called "advanced views" not to be criticized by some large interests.

It is my belief that our people as a whole have confidence in him and wish to see his nomination followed by his confirmation.

Very respectfully, yours,

ROBERT W. NASON.

MARCH 1, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman of the Subcommittee on Judiciary Appointment,  
 Washington, D. C.*

DEAR SIR: From reports of the testimony already submitted to your committee appointed to consider the appointment of Louis D. Brandeis to the Supreme Court of the United States. I have learned that certain unfavorable opinions have been placed before your committee regarding the reputation in this community of the man you are considering.

These opinions are, to my knowledge, not representative of the general opinions of the reputation of Mr. Brandeis.

During my experience as a practicing attorney in Boston I have had brought to my attention on numerous occasions the general reputation of Mr. Brandeis. On every occasion that I have heard mention made of Mr. Brandeis it has always been in commendation of Mr. Brandeis, praising him for his standards of honesty, trustworthiness, fidelity, and profound knowledge of the law. I know these opinions are shared by a substantial majority of the lawyers of this community.

I sincerely hope that Mr. Brandeis will be recommended by the committee for appointment to the Supreme Court of the United States, and I feel that the esteem in which the Supreme Court of the United States is held by the people will thereby be greatly increased.

Respectfully, yours,

LOUIS ABRAHAMAS.

FEBRUARY 19, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, Washington, D. C.*

MY DEAR SENATOR: The nomination by the President of Louis D. Brandeis, of the Boston bar, for the position of Associate Justice of the Supreme Court of the United States meets with my approval.

I have practiced law in Boston for 15 years. The senior member of our firm has practiced in Boston since 1872. Our firm has had frequent matters with Mr. Brandeis's firm. The senior member of our firm, who at present is ill and unable to address you, has many times been interested in matters in which Mr. Brandeis was interested, one side or the other.

Our relations have been cordial, and we have had great respect for Mr. Brandeis and his firm throughout all these years.

From what I hear of the talk of other lawyers, I wish to say to you that I do not believe that the recent protest by certain Boston lawyers in any way represents the feeling of the Boston bar in reference to this nomination.

Yours, truly,

JOSEPH W. BARTLETT.

[From the office of Maurice Bergman, attorney and counsellor at law, Old South Building, Boston, Mass.]

FEBRUARY 29, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, Washington, D. C.*

MY DEAR SIR: I have been in practice in this State since August 31, 1909, and during this period have constantly had before me as an example of success in legal attainment the career of the illustrious Louis D. Brandeis, whom I believe to be a true champion of the people of these United States, and that he stands for honor and integrity and constantly strives to achieve equality for all and special privilege to none.

Having these sentiments in mind, I take the liberty of addressing this communication to you.

Very respectfully, yours,

BOSTON, MASS., March 4, 1916.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee on the Judiciary, Washington, D. C.*

DEAR SIR: In re Louis D. Brandeis. Permit me as a humble member of the Boston bar to add my bit to the many other which you must have received indorsing the appointment of Mr. Brandeis to the Supreme Court.

I have met Mr. Brandeis personally on several occasions, and have found him a man of high ideals. His reputation among the members of the Boston bar, notwithstanding the report given by the self-constituted committee of "State Street lawyers," is most excellent, both as to his personal character and to his legal ability.

I wish I could say as much of several of the remonstrants.

Very truly, yours,

HARRY BERGSON.

MARCH 1, 1916.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate, Washington, D. C.*

DEAR SIR: Permit me to add my indorsement to those of many others, which I am sure you have received in the matter of Mr. Louis D. Brandeis as Justice of the United States Supreme Court. I have had occasion to know Mr. Brandeis quite thoroughly, both as a lawyer and as a man, and though I could give many details of his worth and fitness for the high office to which he has been nominated, I will not encroach so unnecessarily upon your time.

Let me, then, merely summarize by saying that as a lawyer of almost 20 years' practice I would stake my reputation upon the prophecy that Mr. Brandeis will do honor and credit to his country as a Supreme Court Justice.

Respectfully, yours,

WM. M. BLATT.

BOSTON, MASS., March 6, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: As a native and lifelong citizen of Boston and a practicing member of the Massachusetts bar for more than a dozen years, I can not too strongly urge the confirmation by your honorable committee of the nomination of Louis D. Brandeis, Esq., as Associate Justice of the Supreme Court, as I know him to be admirably equipped with the very qualities requisite for such office.

Respectfully, yours,

FEBRUARY 29, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

MY DEAR SENATOR: Permit me to express the hope that your committee will report favorably on the confirmation of Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

I have known Mr. Brandeis for a number of years. I first met him when he appeared before some of the committees on which I had the honor to serve as a member of the Massachusetts Legislature, and I know that even in those days he was considered one of the shining lights of the Massachusetts bar and a man whose integrity and honor was above suspicion. Since then I have known Mr. Brandeis more intimately both as a member of the bar and in philanthropic work and learned to admire and appreciate his many great qualities.

I have no doubt that as a member of the chief tribunal of our great country he will fill the place with honor.

Very truly, yours,

SAMUEL H. BOROFKY.

[Massachusetts Catholic Order of Foresters, Joseph T. Brennan, high chief ranger.]

17 WORCESTER STREET,  
*Boston, February 25, 1916.*

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

SIR: As the executive head of the largest fraternal insurance organization in this State, having an active membership of 42,000 adults; as an attorney practicing in the Federal and State courts for 12 years; as a citizen who has endeavored to keep in close touch with industrial, social, and legal, and political conditions, I have had an extraordinary opportunity to observe the sentiment of the people of this community for and against the confirmation of Louis D. Brandeis as Justice of the Supreme Judicial Court. Outside of a few individuals, with personal or biased motives, and irrespective of class, creed, or race, the unanimous opinion is that the nomination should be confirmed.

I therefore beg to add my name to the long list of those who have already indorsed Mr. Brandeis, and trust that the honorable committee of which you are chairman will report favorably.

Respectfully,

JOSEPH T. BRENNAN.

FEBRUARY 23, 1916.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee of Senate Judiciary,*  
*United States Senate, Washington, D. C.*

DEAR SIR: In view of the fact that several of my associates at the bar have seen fit to protest against the appointment of Louis D. Brandeis, I wish to go on record in favor of his appointment.

I believe that Mr. Brandeis's presence as a member of the United States Supreme Court will greatly strengthen that body.

Yours, very truly,

LAWRENCE G. BROOKS.

40 COURT STREET,  
*Boston, Mass., February 24, 1916.*

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee United States Senate,*  
*Washington, D. C.*

DEAR SIR: This letter is intended as an indorsement of Louis D. Brandeis, who has been nominated as Associate Justice of the Supreme Court of the United States.

I have been practicing law in the city of Boston 12 years and have been a member of the city government of the city of Boston and of the Massachusetts Legislature, and I feel that the opposition that has been shown toward the confirmation of Mr. Brandeis comes from such a circle that opposes anything that

tends toward democracy. I assure you that the different lawyers who signed the petition opposing his confirmation are not the men that rub elbows with the everyday lawyer who practices in our Massachusetts courts.

I think that the addition of Mr. Brandeis to the Supreme Court of the United States would be a great step toward the advancement of ideas that have long had a place in the history of our country.

Very truly, yours,

A. M. BURROUGHS.

FEBRUARY 19, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Washington, D. C.*

DEAR SIR: Referring to the matter pending before the Judiciary Committee of the United States Senate on the confirmation of Hon. Louis D. Brandeis as Associate Justice of the Supreme Court of the United States, permit me to say, in view of the report of the evidence which I have seen in the local newspapers, that in my opinion Mr. Brandeis has the respect and confidence of this community.

I am writing as an attorney admitted to the bar of Massachusetts and practicing at Boston since July, 1894, and now occupying the position of a special justice of the municipal court of the city of Boston.

I know Mr. Brandeis and have met him professionally and in matters relating to civic and social welfare of this city.

I am in favor of the confirmation of the nomination.

Very respectfully, yours,

A. K. COHEN.

FEBRUARY 29, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Washington, D. C.*

DEAR SIR: As a member of the Massachusetts bar and practicing attorney for the past four years, I beg the liberty of registering my heartiest and sincere approval of Louis D. Brandeis, Esq., as Associate Justice of the Supreme Court of the United States, earnestly believing in his sterling qualities, judicial temperament, and national demonstrative ability. I believe I am expressing the sentiments of impartial and unbiased thinkers of this community to whom he has endeared himself through his sympathetic knowledge and wide experience in the needs of our present financial and business organization, in its relation to social organization.

Respectfully, yours,

EMANUEL COHEN.

FEBRUARY 29, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Washington, D. C.*

HONORABLE SIR: Having been born in Boston and educated in its public schools, and having received two degrees from Harvard University, I write you with a deep sense of my responsibility as an American citizen, indorsing Mr. Louis D. Brandeis for the position he has been recently named to by our President.

I realize that a man requires not only exceptional ability but unquestioned integrity in order, adequately, to fill a position in the United States Supreme Court.

I have known Mr. Brandeis for several years, and have met him socially and in a business way. Though of the opposite political party I indorse Mr. Brandeis most highly. I know him to be a man of absolute honesty, unquestioned integrity, and marked ability, and I am positive that he, if confirmed, will fill the position with dignity and to the entire satisfaction of all the people of the United States. I know that I reflect the consensus of opinion of the Boston bar in these statements.

In conclusion, I thank you for giving this letter your attention.

Respectfully, yours,

FRANKLIN M. COHEN.

MARCH 3, 1916.

HON. WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate, Washington, D. C.*

MY DEAR SIR: As a member of the Massachusetts bar and a member of the general court of this State for several years, I wish to attest as to the qualifications, ability, and character of Mr. Louis Brandeis, now under consideration by your committee, as the appointee of President Wilson to the Supreme Court of the United States.

While my professional associations with Mr. Brandeis have not been over an extended period of time, nevertheless whenever I have had occasion to transact business with him I have always found him to have been a man of the highest type, and, as a result of my observations of him, I take pleasure in saying that I have the utmost confidence in him and feel that he is thoroughly qualified in every particular to fill the high office to which he has been appointed by the President.

I am, sir, very truly, yours,

WILLIAM N. CRONIN.

SOMERSET CLUB,  
Boston, March 21, 1916.

TO WOODROW WILSON, *President,*

*Washington, D. C.*

MR. PRESIDENT: In the thought that possibly an added word not idly said by one possessing personal knowledge in regard to a high nomination lately made by you may not prove superfluous, I write as an older Boston and Harvard man who has followed Mr. Brandeis's career with interest from its early stage, and who has known intimately his friends and those of greatest weight who now oppose him, to say that, with full knowledge of the aims of these, I know the best regard the nomination as a singularly happy one. Mr. Brandeis, if his appointment be confirmed, will bring to that high court strong human sympathies and a creative intelligence, as well as legal knowledge, courage of convictions, and clear, quick apprehension. And that he will be adequately conservative in the presence of that great responsibility I have no fear.

I trust accordingly, for the country's sake, that this appointment may, in despite of opposition, be confirmed, and with an expression of high personal respect, I remain,

Yours, truly,

GEORGE B. DORR.

MARCH 1, 1916.

SENATOR CHILTON, *Chairman,*

*Washington, D. C.*

MY DEAR SENATOR: AS an attorney practicing in Boston since 1912, and as a social worker of many years, I desire to take the opportunity of going on record in favor of the appointment of Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

Mr. Louis D. Brandeis is known in this community as a man of great ability and sterling character. His reputation for honesty and uprightness is a matter of common knowledge among all the members of the bar, who have had occasion, disinterestedly, to watch his conduct in the many important causes with which he has been connected. Words of reproach against the reputation of Louis D. Brandeis as a member of the bar can come only from those persons who represent the vested interests and have had occasion very frequently to feel the force of his attacks.

Our country will indeed be fortunate if this learned jurist is placed upon the highest legal tribunal of this land, and that august and majestic body will be increased in strength by his membership.

Very truly, yours,

HARRY E. DUBINSKY.

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,

*United States Senate, Washington, D. C.*

DEAR SIR: I take the liberty of writing the following letter in support of the nomination of Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

My practice has been in the State as well as the United States court the last 16 years, and in 1914 and 1915 served as assistant attorney general of the Commonwealth of Massachusetts, and since has returned to private practice, and have been more or less active in public affairs and public questions.

Mr. Brandeis has been known to me personally and professionally during the last 16 years, and ever since I first met him he has appealed to me as the ideal lawyer and public man. I have been with him in many cases, and notably a large bankruptcy case in 1904, where his conduct with reference to fairness, wisdom, and integrity has ever remained with me as one of the pleasant memories of a lawyer whose practices were far higher than what one is wont to expect. I have differed from him in many questions of public policy, but even in those cases had a feeling that he represented more of the right attitude than I did.

His confirmation to the bench of the United States Supreme Court will be a distinct accession in dignity, force, and learning, and I prophesy that the time will come when his opinions and influence will be regarded as one of the influences of the early twentieth century in the decisions of that tribunal.

I have read of the opposition to his confirmation; I know it comes from a class in our community which, like the old Boston mob, so wonderfully described by Wendell Phillips, were the proponents of slavery, which mob was constituted of the best citizens, so called, of Boston, because of their fear that some tradition of conservatism might be affected, and yet that very class, as you will remember, became the heroes in the war which followed. This class feels—and it is a very small minority of the community, both at the bar and out of it—that unless a man is of the bone and sinew of Massachusetts he should not have high place, however useful, sincere, and effective his career has been. Privately they will admit the almost incomparable attainments of Mr. Brandeis, but they fear the things he seeks to criticize; but they will be the first to realize 10 years later that his criticisms and work are the foundations of a new and better order. Their opposition therefore ought not be regarded too seriously. Their fears discolor their better judgment. The great voice of the country wish the confirmation to be made.

Very respectfully, yours,

L. R. EYGES.

MARCH 9, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: I have been an assistant corporation counsel of the city of Boston for the last 11 years and during that time have had several cases with the office of Mr. Brandeis. He is, to my knowledge, well known at the bar as a lawyer of great learning who has given very largely of his time and abilities to public questions.

I have never heard anyone question his great ability and his capacity for public service. I am of opinion that the real sentiment of the community favors his confirmation as a member of the Supreme Court of the United States, and believe that Mr. Brandeis is a lawyer of great ability whose presence on the Supreme Bench would greatly strengthen it with the people as well as with members of the bar.

I am, very respectfully, yours,

GEO. FLYNN,  
*Assistant Corporation Counsel.*

[Crigler & Frank, attorneys at law, suit, 1117, Third National Bank Building, St. Louis.]

MARCH 16, 1916.

CHAIRMAN OF THE SENATE JUDICIARY SUBCOMMITTEE,  
*Washington, D. C.*

DEAR SIR: I had occasion to notice yesterday in the press dispatches that a letter has been written to you by some of the leading men of this country, among whom were Elihu Root and William H. Taft, the letter in substance stating that it was their painful duty to say that they did not believe Mr. Louis D. Brandeis a fit person for membership in the Supreme Court of the United States.



I wish to call your attention to the fact that during the Glavis-Ballinger investigation Mr. Brandeis was counsel for Glavis; that in the course of the investigation he made Attorney General Wickersham admit that certain papers submitted by the White House to the Senate, at their request, had been antedated by him; that the White House, after denying the antedating, admitted the truth of this fact; that the White House again admitted later certain misrepresentations that it had made with reference to Lawler, a subordinate of Ballinger, and Kerby, Lawler's stenographer.

These decisions plainly show that the White House in response to the Senate's request had sent to Congress an important paper not relied on by the White House, and omitted to send another important paper on which the White House's previous decision relied, but from which only portions were copied. I have as my authority for this a preface, by Ernest Poole, to the book *Business a Profession*, by Louis D. Brandeis, and published by Small, Maynard & Co., Boston, page xxxix et seq. In connection with Ballinger's grilling examination by Brandeis, Mr. Root intervened with certain questions, showing his interest in the affair.

I have no doubt but that the Senate records of this investigation will bear out these assertions. A President is primarily responsible for the conduct of members of his administration, and perhaps this incident will throw a little light upon why Mr. Taft and Mr. Root are so "pained" to write the above letter to you.

If you doubt the truth of any of my statements above, I believe a little investigation on your part will reveal the fact that they are true. I am sending a copy of this letter to President Wilson.

Trusting that you will give the above due consideration, and that the real motive behind the letter written will be seen by you, I beg to remain,

Yours, very truly,

MALCOLM I. FRANK.

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[Max M. Fritz, attorney and counselor at law, 40 Court Street.]

BOSTON, MASS., *March 1, 1916.*

HON. WILLIAM E. CHILTON,

*Chairman Subcommittee, Washington, D. C.*

DEAR SIR: I have been a member of the Massachusetts bar for the past nine years, and have always looked upon Louis D. Brandeis as the ideal type of a lawyer. I have always heard none but the highest comment concerning his practice at the bar and his willingness to offer his services to the people at all times.

I respectfully urge you and your committee to submit a favorable report in the matter of the appointment by the President of Louis D. Brandeis as Associate Justice to the Supreme Court of the United States.

Very truly, yours,

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MARCH 1, 1916.

HON. WILLIAM E. CHILTON,

*Chairman of Subcommittee, Washington, D. C.*

DEAR SENATOR CHILTON: As a member of the Massachusetts bar practicing in Boston for nearly 16 years, and familiar with the reputation of all our big lawyers and the nature of their practice, I desire, in the interest of justice, to write to your committee strongly urging the confirmation of Louis D. Brandeis as a member of the Supreme Court of the United States.

The criticisms of Mr. Brandeis, of which I have read in the daily papers, all come from business men whose methods and interests have been attacked by Mr. Brandeis or from lawyers who represent the so-called "vested interests," whose methods have been so ably exposed by Mr. Brandeis in the public interest. I have looked in vain among the names of the men who are opposing Mr. Brandeis for a single one whose interest it has been to promote the public welfare, and in the last analysis it seems to me that the objection to Mr. Brandeis on the part of his opponents is that he would not be very friendly to illegal combinations in restraint of trade. So far from being an objection this strikes me as being a splendid recommendation for an appointee to the Supreme Court of the United States.

Neither Mr. Bailey nor any of the attorneys representing the large corporations, who have appeared before your committee to oppose the confirmation of Mr. Brandeis, represents the opinion of the Massachusetts bar as to the reputation of Mr. Brandeis for "straightforwardness" and "fair dealing." The rank and file of the bar who know anything about Mr. Brandeis, either by reputation or from business relations with him, believe him to be a high-minded, conscientious, honorable lawyer, and I believe it would be for the best interests of the country that Mr. Brandeis should be confirmed.

Very truly, yours,

FRANCIS P. GARLAND.

18 TREMONT STREET,  
Boston, March 1, 1916.

United States Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: As an active member of the Boston bar for the last 10 years, I have been in close touch with many matters in which Louis D. Brandeis, Esq., of Boston, has been interested. I feel it my duty, therefore, to call the attention of your honorable committee and the Members of the United States Senate that it is my belief that there is no more honorable member of the Massachusetts bar. He has the highest respect of all those with whom I have come in contact, not only for his ability but for his honesty and integrity.

I most heartily approve that his nomination by President Wilson as a Justice of the United States Supreme Court be confirmed.

Respectfully, yours,

EDWARD E. GINSBURG.

[Nathaniel Golden, counselor-at-law, 40 Court Street, Boston.]

FEBRUARY 29, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: As a graduate of Harvard College, 1912, and of Harvard Law School, 1914, and as a member of the Suffolk bar of the Commonwealth of Massachusetts, I beg to add my hearty approval of the confirmation of the appointment of Louis D. Brandeis, Esq., as a justice of the United States Supreme Court.

Though my personal acquaintance with Mr. Brandeis is but a recent thing, my knowledge of his unselfish and illy recompensed devotion and service to the cause of the mass of people extends back for many years. When I recall a conversation that I had with President Lowell some three years ago anent Mr. Brandeis who had a few days previously delivered a lecture in Cambridge on one of the many humane things to which he has so long given of his time and money, I can not help but form the conclusion that the sincerity and purity of motives of the signers of the petition of protest, of whom President Lowell was one, must be impugned, and that it is predicated upon some ulterior purpose.

The general public has long recognized and admired Mr. Brandeis's profound mentality and his courageous love for the truth, and I am certain that the general sentiment is overwhelmingly in favor of his confirmation.

Yours, very truly,

FEBRUARY 28, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I am writing you this letter as an indorsement of Louis D. Brandeis, who has been nominated as Associate Justice of the Supreme Court of the United States.

I am a member of the bar, and, although I am a former member of the Republican city committee of Chelsea, I would not permit politics to enter into my indorsement of Mr. Brandeis.

I have been personally acquainted with Mr. Brandeis for several years and he has impressed me as a possessor of keen intellect. He engages both in pub-

lic and private activities with sincerity of purpose, and I have always considered him a rare man.

I believe that the opposition to his confirmation comes from sources that may be classified under the category of special privilege, and it would indeed be lamentable for the progress of this Government if the moneyed interests should influence the appointment of any man to the greatest court in the world.

Permit me to assure you that I am heartily in favor of the confirmation of Mr. Brandeis. I am,

Very respectfully,

GEO. E. GORDON.

FEBRUARY 23, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

HONORABLE SIR: I take the liberty of indorsing the appointment of Louis D. Brandeis, Esq., as Associate Justice of the United States Supreme Court.

I have discussed this appointment with a large number of lawyers and people in this community, and can unhesitatingly say that this appointment meets with the approval of a great majority of the legal profession in this city and the people of our community.

From my observation and study of this controversy I am led to the conclusion that no small part of the opposition is due to racial prejudice, and that the rest of the opposition can be attributed to hostile corporation or privileged interests.

I have been a member of the Massachusetts bar for over 10 years and have practiced in the United States courts for several years. I have served my community in our city government and the Massachusetts Legislature, and by reason of such service and in the course of my practice I have had occasion to meet Mr. Brandeis and consider his attitude on many important public questions.

I know Mr. Brandeis to be a man of sterling character, of excellent standing in the legal profession and our community, possessed of a profound knowledge of the law, and one of the leading lawyers of our State. By reason of his knowledge of the law, ability to regard weighty and vital problems with keen and sagacious discernment, his experience with and knowledge acquired in important labor controversies, and participation in so-called "people's conflict with railroads, gas companies, and monopolies," and other questions and matters vitally affecting the people of our country, he is as thoroughly equipped for that honorable body as any man in the public eye to-day, if not more so.

I feel that failure on the part of the United States Senate to confirm this appointment would almost amount to a public calamity, and I strongly urge your honorable committee to make a favorable report in his behalf.

You are at liberty to make as much use of this letter as you deem advisable or necessary.

Respectfully, yours,

ISAAC GORDON.

17 MILK STREET,  
*Boston, Mass., March 3, 1916.*

HON. WILLIAM CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: In view of the so-called "Boston petition," and the wholly unexpected quarter from which the voice of the people appears to have emanated, possibly the opinion of an inconspicuous member of the Boston bar, but one who has had many dealings with Mr. Brandeis, may be of some interest.

During the past 13 or 14 years I have been general counsel for the Boot and Shoe Workers' Union, an organization composed of 40,000 men and women shoe operatives throughout the United States and Canada. In many important matters affecting the shoe industry Mr. Brandeis represented the shoe manufacturers, and in conference serious difficulties were often averted by the sound judgment, the keen insight, and the absolute fairness of Mr. Brandeis. In several controversies affecting the union where the interests of Mr. Brandeis's clients were not involved I retained him as senior counsel, notwithstanding the fact that this gave him information which had been unscrupulous or untrustworthy could have been used to our disadvantage. My selection of Mr. Brandeis as senior counsel in these matters was always approved by the

general officers of the union, and our implicit confidence in his integrity remains unshaken.

I have known Mr. Brandeis for 20 years. Until the New York, New Haven & Hartford Railroad inquiry I never heard from professional or business men any expression but of the highest admiration. I know many of his clients, men of high standing in business, who have been advised and guided by him for years, and who, I am confident, would intrust their entire personal fortunes and their business honor in his keeping.

I believe that Mr. Brandeis has the complete confidence of this community excepting only those whose enmity he has incurred in his efforts to correct abuses, and I trust the nomination of the President will be confirmed.

Respectfully, yours,

EDWARD S. GOULSTON.

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MARCH 1, 1916.

MR. WILLIAM E. CHILTON,

*Chairman of Subcommittee, Washington, D. C.*

DEAR SIR: As a member of the Massachusetts bar I feel it my duty to express my views relative to the confirmation of the appointment of Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

I have known Mr. Brandeis for the past 20 years, and I feel justified in saying that his reputation as to honesty and integrity is above reproach and that the attempts to stain his trustworthiness are the result of unfairness and undue prejudice.

I am fully convinced that Mr. Brandeis is especially qualified for the position, as I know him to be a man of high ideals, one who will exercise his own best judgment regardless of fear or favor, one who can not erroneously be influenced even for personal gain, but will, if necessary, sacrifice his own interests for those of the public.

I am fully confident that the confirmation of Mr. Brandeis's appointment will add an important link to the chain of the administration of justice of our judicial department. He will be a protection not only to the prestige and honor of the Supreme Court itself but a protection also to the people and the great masses of the country.

Very truly, yours,

ISAAC H. GREENBERG.

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[Elisha Greenwood, attorney at law, 604-5 Pemberton Building.]

BOSTON, March 1, 1916.

HON. W. E. CHILTON,

*Chairman Subcommittee of Judiciary Committee,*

*Washington, D. C.*

DEAR SIR: Having been in very active practice at the Boston bar for the past 31 years, I feel I should furnish your committee with whatever light I may have respecting the confirmation matter now pending before it.

I do not suppose there is a practitioner at our bar who knows and has come in contact with a greater percentage of all possible subdivisions of our bar of 3,200 members than I, and I suppose it is obvious to every lawyer of any substantial experience—

First. That the individual constituents of no class of men are so thoroughly dissected within its own ranks as those of the legal profession.

Second. That, particularly if successful and originating in other than the prevailing nationality or creed, they are very likely to be the victims of jealousy, mistrust, and misunderstanding, with the usual concomitants of prejudice and enmity.

Having these two important facts in mind, along with my lengthy experience and unusually extensive professional acquaintance, I desire to say that, notwithstanding Mr. Brandeis's long and highly successful professional activities here, his prominence as a publicist in many necessarily friction-making movements, and his nationality, it is true that never before the nomination which you are considering did I hear, even in a whisper, a single word tending to indicate the slightest variation on his part from the highest standard of pro-

fessional honor and ethics, and that the attacks now made upon him are to me as thunder out of a clear sky.

I must admit that my professional experiences with him have not been very many, but I do flatter myself with knowing the general reputation of the members of our bar; and I must express the opinion that the supposed general reputation which his opponents are presenting to your committee must be simply the prejudiced opinion of a comparatively small and very localized section of our bar, which honestly believes itself to be the bar, and that its sentiments—usually originating in and propagated by one of its small circle—are those of the entire community.

You will pardon me if, in closing, I add that some 30 years ago I was for over a year editor in chief of the Central Law Journal, and that about that time I wrote the treatise "Greenhood on Public Policy in the Law of Contracts," besides editing two columns of Federal decisions in constitutional law, and being a rather extensive contributor otherwise to legal literature in my early law days.

I have the honor to remain, yours, very truly,

FEBRUARY 18, 1916.

Senator WILLIAM E. CHILTON,

*Chairman of Subcommittee, Washington, D. C.*

DEAR SIR: In the interest of fair play, I do not think that the testimony of Hollis R. Bailey, Esq., and others as to Mr. Brandeis's reputation in Boston should remain uncontradicted. I have been practicing law here for 12 years or more and during that time I have never heard Mr. Brandeis's fair-mindedness or integrity attacked except by those representing "special interests" who were engaged in a controversy with him or by newspapers known to be controlled by those "special interests" or suspected to be under their influence.

He has here the reputation of being ever ready to see the right irrespective of the person it is attached to, and of being able to demonstrate that right in the face of overwhelming opposition, but most conspicuously I think he stands in our community as a man who, after his great ability has been proved, has continued to be willing to serve, and who has served with remarkable success, those who needed service, but who were not strong financially nor powerful otherwise.

Respectfully, yours,

LOUIS E. GUILLOW.

MARCH 2, 1916.

Senator WILLIAM E. CHILTON,

*Chairman Subcommittee on Judiciary,*

*United States Senate, Washington, D. C.*

DEAR SIR: I beg to register my name as being in favor of the confirmation of the appointment of Louis D. Brandeis to the Supreme Court of the United States.

From 1905 to September, 1908, I was secretary and assistant to the late Prof. Frank Parsons, who, as an eminent lawyer, law text writer, sociologist, and economist, is undoubtedly known to you and your committee. As an expert for the National Civic Federation and head of the National Municipal Ownership League, and in many other capacities, Prof. Parsons was very closely connected with Mr. Brandeis in his work. I learned from Prof. Parsons to regard Louis D. Brandeis as a lawyer of exceptional ability, as a man of the highest integrity, and as a public-spirited citizen of the finest type.

Since 1908 I have watched Mr. Brandeis's work, particularly his public work, and I desire to say that I know of no man who is more honest or public-spirited or who has greater ability as a lawyer. I believe that Mr. Brandeis as a member of the Supreme Court of the United States would be a great addition to that already great tribunal.

It is my opinion that there are two reasons for the strong opposition which has developed against Mr. Brandeis's confirmation.

First, the fact that he has always stood for the public against the vested interests, even when to do so meant great loss to himself.

Secondly, and I consider this to be the stronger reason for this opposition, that Mr. Brandeis is a Jew.

I desire most earnestly to urge upon your committee the recommendation that Mr. Brandeis's appointment be confirmed.

Very respectfully, yours,

HARRY N. GUTERMAN.

[Hall & Hagerty, attorneys and counsellors at law, Taunton, Mass. Frederick S. Hall, Charles C. Hagerty.]

TAUNTON, MASS., February 21, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee,  
Washington, D. C.*

MY DEAR SIR: I notice from the papers and from other sources that the nomination by the President of Louis D. Brandeis, of Boston, for a seat on the bench of the Supreme Court of the United States has created quite a widespread discussion.

Being interested in the man, having watched his movements, and having had a number of years' experience with his office in connection with large interests, I think I can truthfully say that personally I have never known him to do or say anything which was not in strict accordance with strict legal propriety, and until this nomination came up I have never heard him criticized. A man of such wide knowledge and legal attainments would naturally make enemies, but it seems to me, from what I have observed, that there is nothing which would in any way disqualify him from filling this most important position to which he has been nominated.

Respectfully, yours,

CHARLES C. HAGERTY.

FEBRUARY 21, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate Subcommittee of Judiciary,  
Washington, D. C.*

DEAR SIR: It gives me great pleasure to write in regard to Louis D. Brandeis. I understand that a number of prominent Boston lawyers have said that Mr. Brandeis is not respected by the Boston bar. I think you will find upon investigation that almost all of these men have been bitterly opposed to Mr. Brandeis on some financial or public question. He has naturally tread on the toes of a great many conservative men and men tied up in large interests, such as the New Haven Railroad. I think, therefore, that their statements must be taken with a grain of salt.

It seems to me that Mr. Brandeis's chief qualities for a position on the Supreme Court Bench are his broad point of view in regard to present-day economic questions and his very great knowledge of the facts and conditions of our modern economic industrial world.

There are many other lawyers in Boston who feel as I do about this matter, and I hope that you will not consider the opinions expressed by Mr. Moorfield Storey as binding upon the rest of us.

Very sincerely,

MATTHEW HALE.

BOSTON, February 9, 1916.

HON. LEE F. OVERMAN,  
*Acting Chairman Judiciary Committee, Washington, D. C.*

DEAR SIR: It has been my great privilege to have known Louis D. Brandeis intimately for 15 years, during which time he has been my personal and business counsellor. I never knew him to advise or suggest anything that was not founded on the highest ethical grounds. I have no doubt of his confirmation, as it is inconceivable to me that any objection worthy to be seriously considered can be offered or that would weigh in the balance against the great addition he would be as an Associate Justice of the Supreme Court.

In my judgment there is no man living who is more the perfect embodiment of what he will be sworn to administer—justice.

Very truly, yours,

C. B. HALL.

WAUKESHA, WIS., March 14, 1916.

Senator GEORGE W. NORRIS.

DEAR GEORGE: Without intending or wishing in any way to influence your judgment but only to give you a little facts as they have come to me, I will say that you, of course, remember that Lois's mother had something of an estate left her in Boston by her father.

This was, as I think I explained to you at the time, left in quite a complicated condition. I have never seen any of the firm, but I wrote to Brandeis, Dunbar & Nutter and asked them to look after Lois's interests, which they did. They got very good results, and they are still looking after this estate. Their charges were very modest, considering the work and the results they got, and in view of the attack on Mr. Brandeis I thought that in justice to him I would give you these facts.

Very truly, yours,

H. H. HARRINGTON.

MARCH 1, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: Believing the appointment of Louis D. Brandeis to the United States Supreme Court to be most fitting and proper, I respectfully request that you add my name to the multitude indorsing the appointment.

I assert, resolutely, from my long acquaintanceship with Mr. Brandeis professionally and publicly that there is no higher type of citizen or public servant in our country, notwithstanding the attacks his candidacy has evoked. I know of no man in our city who is held in higher esteem or regarded with greater reverence and respect than the appointee.

I am aware of the importance, influence, and standing of the United States Supreme Court, the highest court in the world, and I believe that Mr. Brandeis would adorn this venerable body.

Respectfully, yours,

ISAAC HARRIS.

JOSEPH M. HERMAN SHOE CO.,  
*159 Lincoln Street, Boston, Mass., February 25, 1916.*

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SENATOR: I have known Mr. Louis Brandeis since he entered upon the practice of law. I have come into close contact with him in his personal and social life, in his professional career, and in his public civic activities. It is because of a long and intimate knowledge of the man that I, a member of an opposing political party, heartily indorse President Wilson's selection of him to be an Associate Justice of the Supreme Court of the United States and earnestly urge the Senate to confirm his appointment.

Mr. Brandeis is one of the few lawyers of our time in this country who has willingly sacrificed lucrative pecuniary returns to an ideal conception of public service. His ability as a lawyer, his luminous and keenly trained intellect, his untiring industry and abnormal capacity for work, would have brought to him permanent retainers from all the great corporate interests in New England had he not voluntarily chosen to forego such retainers in the interest of his own independence of thought and action.

The Nation has always needed the services of men of the Brandeis type, and the confidence of the people in the Nation's highest tribunal can not help but be strengthened by the selection of such a man for a place on its bench.

Of Mr. Brandeis's private life I need not speak, for it has never needed commendation. In temperament he is dignified, calm, and dispassionate; and unless fearlessness in announcing the right as he sees the right can be said to deprive a man of what is called judicial temperament, then Mr. Brandeis possesses that temperament to the highest degree.

Yours, very respectfully,

JOSEPH M. HERMAN.

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: May I add a word in favor of confirmation of the nomination of Louis D. Brandeis?

I am a Democrat, and have been president of the National Democratic League of College Clubs and vice chairman of the State committee of Massachusetts. In 1911 I was a member of the State senate, and declined renomination. In 1914 and 1915 I was second, and then first, assistant attorney general of the Commonwealth, retiring with the change of administration. I am now engaged in private practice. I am a director of the Massachusetts Farmland Bank and of several manufacturing corporations. I am member of the National Council of the American Judicature Association.

For two years I served in the office of Brandeis, Dunbar & Nutter, and came into personal contact with Mr. Brandeis on legislative matters while in the senate. I do not believe that I am prejudiced in his favor, but I do know from personal experience that his office maintains an unusually high standard of legal ethics. Mr. Brandeis has not been content with being merely personally incorruptible, but he and his associates have insisted that the subordinates in their office adhere to the same high standard.

With the exception of a few lawyers in the certain restricted district, I believe the sentiment of the Boston bar to be distinctly in favor of the Brandeis appointment.

Yours, very truly,

ROGER SHERMAN HOAR.

BOSTON, March 2, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman of the Subcommittee on Judiciary, Washington, D. C.*

DEAR SIR: From reports of the testimony already submitted to your committee appointed to consider the appointment of Louis D. Brandeis to the Supreme Court of the United States, I have learned that certain unfavorable opinions have been placed before your committee regarding the reputation in this community of the man you are considering.

These opinions are to my knowledge not representative of the general opinion of the reputation of Mr. Brandeis, and it is for that reason that I take time to write to you to inform you of my knowledge regarding the reputation of this candidate.

I am a practicing attorney, having offices in Boston and vicinity. I have had brought to my attention on many different occasions the general reputation of Mr. Louis D. Brandeis. On every occasion that I have heard mention of him it has always been a recommendation of Mr. Brandeis, praising him for the standard of honesty, trustworthiness, fidelity, and profound knowledge of the law to which he adheres. All these opinions have been expressed by lawyers, members of the same club to which I belong, and who I had reason to believe had personal knowledge and acquaintance with Mr. Brandeis.

I sincerely hope that Mr. Brandeis will be recommended by the committee for appointment to the Supreme Court of the United States.

Respectfully, yours,

M. H. HORBLITT.

FEBRUARY 25, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I take the liberty of addressing this communication to you for the purpose of indorsing Louis D. Brandeis, who has been nominated by President Wilson as Associate Justice of the Supreme Court of the United States.

I am a lawyer with offices in Boston, and I have been in active practice for eight years.

I am president of the Associated Young Men's Hebrew Associations of New England, an organization comprising 45 young men's Hebrew associations scattered throughout the New England States, with a total membership of over 15,000 men. In my capacity as president of this organization, for the past two years, I have had occasion to travel throughout the district, coming in contact with large numbers of our citizens, and I can say that everywhere I have heard only the highest words of praise and commendation of Mr. Brandeis.



At a number of large public meetings that I have been present, addressed by Mr. Brandeis, the reception accorded him far surpassed any that I have ever witnessed received by any private citizen.

Ever since his nomination I have talked to many members of the Massachusetts bar, and I have heard the appointment generally discussed. In no instance have I heard anything but approval, and in no instance have I heard anything unfavorable.

There is no question in my mind but that the opposition to his appointment comes from a very small and narrow circle, and that the opinions that they express are their own and not those of the general public or of the large majority of the members of the Massachusetts bar.

I heard of Mr. Brandeis even before I became a member of the bar, and for the past two years I have come in contact with him personally. He has always impressed me as being a man of high ideals and principles, possessing a keen and analytical mind and a close student of social and economic problems. He unquestionably possesses all of the qualifications that should go to make of him a great jurist.

I am, very respectfully, yours,

ALBERT HURWITZ.

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FEBRUARY 24, 1916.

Hon. C. S. THOMAS.

MY DEAR SENATOR: I have known and contacted with Brandeis for over 25 years and have never known or heard of his being guilty of unprofessional conduct.

As his ability is conceded, it is merely a matter of judicial temperament, and that is another term for viewpoint and perspective. He possesses it as much as Milburn or Cromwell or men who would be named by them, and very much more than A. L. Lowell, president of Harvard University, who, having selected a Jewish holy day for examinations last summer, refused to allow Jewish students another day for taking the examinations and advised them to dictate the work to hired stenographers.

We need men on the bench who will not measure and limit rights and liberties of this century by precedents and opinions of the mediaeval ages.

Very respectfully,

H. J. JAQUITH, LL. B.

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FEBRUARY 19, 1916.

Hon. WILLIAM E. CHILTON,

*Chairman Senate Subcommittee, Washington, D. C.*

DEAR SIR: In view of the suggestion made to your committee, that an unfavorable opinion of Mr. Brandeis held by a portion of this community should in itself prevent his confirmation, I take the liberty of stating my dissent from this opinion of him and from the position so suggested. Mr. Brandeis's talents and legal learning are undisputed. These, with his wide experience, his study of public questions, and especially his readiness and resourcefulness in recognizing and meeting changing industrial conditions, enable him to make a contribution to public service as a Justice of the Supreme Court which possibly no other man in the country could make. I have been in the practice of law in Boston since 1898, have known Mr. Brandeis during most of that time, and have heard his character frequently discussed. While I have known of the unfavorable opinion of him entertained by a considerable number of lawyers, including men of character and standing, nevertheless, I have not heard from lawyers any specific charges of unprofessional or dishonorable conduct made with personal knowledge, and I think I have not heard from lawyers specific reference to cases, upon which an unfavorable opinion was based, outside of those which have been mentioned before your committee. Considering the many heated controversies, private and public, in which Mr. Brandeis has been engaged, testimony as to his reputation can have little weight except so far as it is shown to rest upon facts. My own acquaintance with Mr. Brandeis for some 15 years leads me to believe him to be a man honorably and sincerely devoted to the public interest.

Respectfully, yours,

ELIOT N. JONES.

WORCESTER, MASS., *March 4, 1916.*

Senator WILLIAM CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: During the 12 years I have been in business it has been my good fortune to come in personal contact with the Hon. Louis D. Brandeis, whose appointment to the Supreme Court is being considered by your committee, and it gives me pleasure to state that I have always found him to be a man of the highest integrity and ideals. My contact with him and knowledge of him gives me every reason to believe him absolutely honest and straightforward in business dealings and in his public life.

Whatever opposition to his confirmation may develop must, it seems to me, come either from a very narrow circle of attorneys or else from the interests which Mr. Brandeis has necessarily (and not unworthily) antagonized during his public career.

Such opposition certainly does not represent the sound sentiment of the community, which, to the best of my belief, is strongly in favor of Mr. Brandeis's confirmation.

For all these reasons, and for the best interests of the commonweal, I trust you may speedily report in favor of Mr. Brandeis's confirmation.

Very truly, yours,

MAURICE L. KATZ.

801-805 TREMONT BUILDING,  
*Boston, February 18, 1916.*

DEAR SENATOR CHILTON: Respecting the appointment of Hon. Louis D. Brandeis to the Supreme Court of the United States, I want to say as a lawyer, 47 years old, as a member of the bar association of the city of Boston, and as a member of the American Bar Association, that I consider Mr. Brandeis not only an able attorney, but a man above reproach, who will add ability, integrity, grace, and dignity to the great bench to which he has been appointed. He is an honest man, conscientious to a marked degree, who has raised himself above the sordidness and show of mere wealth, and looks to the character and worth of the individual as the better elements of our citizenship aside from mere accumulation of cash. Louis D. Brandeis is a man with a vision of the American people and the Nation's possibilities. He will hew to the line for the future of the great Republic and the rights of all of its citizens.

Perhaps I should add as a means of identifying myself, that I served three years as a member of the Boston school committee, a board of five; and I am now a member of the Boston Finance Commission, a board of five, appointed by the governor of our Commonwealth to supervise the finances of the city of Boston.

I am, respectfully, yours,

JAMES P. MAGENIS.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee, Washington, D. C.*

FEBRUARY 18, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I venture to write to you on behalf of Louis D. Brandeis and express the hope that his appointment may be confirmed.

I have been a member of the Massachusetts bar since 1902 and am a member of the Boston Bar Association and the Massachusetts Bar Association. For the last 10 years I have been prominently identified with labor interests, and have represented labor unions and the American Federation of Labor officially as their attorney during practically all that time. In the course of my practice I have had occasion to meet Mr. Brandeis professionally many times, and from the standpoint of labor I do not hesitate to say that his conduct has been admirable. He has been fearless in his championship of the people's rights and has never hesitated to take up the cause of a labor union or even of unorganized workers when he thought that cause was just. He stands very high in the estimation of the labor men of New England, and I know of nothing which would afford them greater satisfaction than his confirmation as a judge of the United States Supreme Court.

I venture to say that most of his enemies have been made by his championship of the people's rights, and I know of no instance where a whisper has been raised against him by the "people" themselves. I am very sure that he will make a strong, able, fearless, and impartial judge, and that, high and august as the United States Supreme Bench is, Louis D. Brandeis would grace it.

Yours, very truly,

FREDERICK W. MANSFIELD.

MARCH 2, 1916.

Hon. W. E. CHILTON,

*Chairman Subcommittee, United States Senate, Washington, D. C.*

DEAR SIR: As a member of the Massachusetts bar of many years' standing, I consider it my duty to express my opinion regarding the appointment of Louis D. Brandeis to the Supreme Court of the United States. That I am not influenced by political motives or partisan considerations is evidenced by the fact that I am and always have been a Republican.

It is, however, a pleasure to advocate the confirmation of a lawyer who possesses not only legal ability of the highest order but also a judicial mind and foresight such as was possessed by the framers of the Constitution of our country. His untiring efforts in behalf of the rights of his fellow citizens and indomitable courage in opposing wrong has won him hosts of ardent friends, and, naturally, bitter enemies.

The general sentiment of the public in Massachusetts is unquestionably with Mr. Brandeis, and with the exception of the interests which have reason to fear his unflinching and unswerving fidelity to the public welfare, it is the desire of Massachusetts that he be confirmed. The confirmation of Mr. Brandeis as a justice of the United States Supreme Court would be a distinct addition in character, legal knowledge, and judicial ability, and will surely add to the respect and esteem in which this highest judicial body of the Nation is held by the great masses of its citizens.

Respectfully, yours,

HENRY I. MORRISON.

FEBRUARY 23, 1916.

Hon. WILLIAM E. CHILTON,

*Chairman of Subcommittee on Judiciary,  
United States Senate, Washington, D. C.*

DEAR SIR: I wish to record my earnest desire that the appointment of Mr. Brandeis as a judge of the Supreme Judicial Court be confirmed.

I am not and never have been a Democrat, but write because from some personal knowledge of what Mr. Brandeis has done I think he is inevitably qualified for the position.

Respectfully, yours,

FRANK H. NOYES,  
73 Tremont Street, Boston, Mass.

MARCH 1, 1916.

Hon. WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate,  
Washington, D. C.*

DEAR SIR: I am sending this letter as an indorsement of Louis D. Brandeis, who has been nominated as a Justice of the United States Supreme Court. I have practiced in Boston for about eight years and have always been identified as a member of the Republican Party.

The general opinion concerning Mr. Brandeis which has come to my attention and knowledge has been that he is one of the ablest attorneys practicing in this country. I have never heard his character assailed or integrity questioned by any except a few of the financial interests who may have suffered somewhat by Mr. Brandeis's activity as a friend and counsel of the general public.

I sincerely trust that Mr. Brandeis will receive the confirmation of the United States Senate which he justly deserves.

Yours, respectfully,

MAX L. LEVENSON.

MARCH 2, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: I wish to record my indorsement of Louis D. Brandeis, recently nominated as a Justice of the United States Supreme Court. As a member of the Massachusetts bar for about 14 years I have had some opportunity of judging Mr. Brandeis, both from a professional and personal standpoint, and I wish to say that I have nothing but the highest regard for his integrity, honesty, and ability. I feel sure that his many years of activity and practice before all courts and commissions of this country have given him a vast experience and unquestioned judicial temperament.

My residence is in Chelsea, Mass., the home city of Congressman Ernest W. Roberts. I have always been identified as a member of the Republican Party, having had the privilege of being a member of the Republican city committee and a member of the school board of the city of Chelsea for several years. I am now representing the fifth Suffolk district as a member of the Massachusetts Legislature.

I am sure that any opposition which may be brought to your attention against the confirmation of Mr. Brandeis comes from a small circle of people who are biased either because of narrowmindedness or because they may have suffered financially from Mr. Brandeis's activity in the public welfare.

Trusting that Mr. Brandeis will receive the confirmation of the United States Senate, I am,

Yours, very respectfully,

JOSEPH M. LEVENSON.

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BOSTON, March 3, 1916.

Senator WILLIAM E. CHILTON,  
*Washington, D. C.*

DEAR SIR: I graduated from Harvard College in 1903 and from the Harvard Law School in 1906. I passed the Massachusetts bar examination in 1905 and have been practicing at the Suffolk bar ever since.

While at the law school I heard of the fame of Louis D. Brandeis, Esq., and from the time I left the law school to this date I have had considerable opportunity to watch Mr. Brandeis grow in reputation as a lawyer and as a man. I am happy to be able to say that his growth in both respects in the estimation of the community has simply been marvelous. He certainly has been one wonderful example and inspiration for all members of the bar and all other persons in the community. I have never heard any criticisms derogatory to his character or reputation. His wonderful and repeated successes in the most complicated cases and his untiring efforts in behalf of the people at the sacrifice of considerable time and expense to himself have endeared him to the country at large.

It is no wonder that our honorable President of these United States has seen fit to appoint him as the one man fit and able to occupy the exalted position of Associate Justice of the Supreme Court of the United States.

Can it be said that our beloved President has been influenced by anything outside of the highest motive for the welfare of all the people in his appointment of Mr. Brandeis? The whole record of Mr. Brandeis's career must certainly have been reviewed by the President before he exercised the privilege and right under the Constitution to fill the vacancy on the Supreme Bench.

It seems to me that the opposition to Mr. Brandeis's confirmation comes from persons who are envious or jealous of his remarkable rise in the world or to the fact that Mr. Brandeis has so often and so successfully championed the cause of the common people against encroachments by monopolists and monopolistic combinations.

I humbly join in the almost universal desire that our President's appointee be unanimously confirmed.

I have the honor to be, respectfully, yours,

ABRAHAM LEVENTALL.

MARCH 7, 1916.

HON. WILLIAM CHILTON,

*Chairman of the Senate Subcommittee, Washington, D. C.*

DEAR SIR: As a member of the Women Lawyers' Association of the State of Massachusetts and as a practicing attorney before the bar of this State I earnestly advocate the confirmation of the nomination of Louis D. Brandeis for the United States Supreme Judicial Court.

Trusting that you will recognize his entire fitness for that great and honorable position, I am,

Yours, truly,

ROSAMOND H. LEVY.

MARCH 1, 1916.

Senator WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate,**Washington, D. C.*

DEAR SIR: Having made a specialty of the patent laws of this country and foreign countries, for the past five years our office has been doing a great deal of associate work on patent matters with the general-law practitioners in and about this city.

We are personally acquainted with Mr. Louis D. Brandeis, the President's nominee for the vacancy in the Supreme Court of the United States of America, and have, since the question of his confirmation has arisen, discussed his qualifications for that office with many of our clients, who are prominent members of the Massachusetts bar. We find their opinions to be absolutely in his favor and are satisfied that the opinions expressed before your honorable committee, as we understand them, by a few attorneys from Boston, to the end that the reputation of Mr. Brandeis is questioned throughout the Massachusetts bar, are positively without foundation.

We sincerely urge the confirmation of Mr. Louis D. Brandeis as Associate Justice of the Supreme Court of the United States.

Very respectfully,

DAVID LICHTENSTEIN.

BENJAMIN H. CHERTOK.

MARCH 8, 1916.

Senator WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate,**Washington, D. C.*

MY DEAR SENATOR: May I express my sincere hope that your committee will report favorably on the confirmation of Louis D. Brandeis as associate justice of the Supreme Court of the United States.

As a member of the Massachusetts bar and as president of the Associated Young Women's Hebrew Associations of New England I have had occasion to meet Mr. Brandeis frequently and have found him to be a man of the highest integrity.

I am certain that as a member of the Supreme Bench of the United States Mr. Brandeis will fill the office honorably.

Yours, very truly,

S. M. LIPNER.

BOSTON, MASS., March 3, 1916.

JACOB J. KAPLAN, Esq.,

*161 Devonshire Street, Boston, Mass.*

DEAR MR. KAPLAN: Inclosed herewith find copies of letters in the Brandeis matter, which I received from Harry H. Guterman, Henry I. Morrison, David Lichtenstein, Benjamin H. Chertok, Harry Silverman, Joseph H. Samuel, Florence F. Sullivan, Israel Ruby, Isaac Harris, Elisha Greenhood, Max M. Fritz, A. E. Pinanski, Louis Abrahams, William E. Blatt, Isaac H. Greenburg, Harry E. Dubinsky, Edward E. Ginsburg, Albert Hurwitz, Eugene M. Schwarzenberg, Adolphus M. Burroughs, Samuel L. Silverman, George E. Gordon, Samuel H. Borofsky, Nathaniel Golden, Maurice Bergman, Emmanuel Cohen, Samuel L. Wolfson, Franklin M. Cohen.

Very truly, yours,

DAVID A. LOURIE.

FEBRUARY 18, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: As a member of the Massachusetts bar for 26 years, 23 of which have been spent in general practice, and 3 years as assistant corporation counsel for the city of Boston, and having known and had professional dealings with the firm of Brandeis, Dunbar & Nutter, of which Louis D. Brandeis is the senior member, I indorse his appointment for confirmation as an Associate Justice of the Supreme Court of the United States. I believe that Mr. Brandeis will bring to the high office to which he has been nominated ability, learning, and that sense of unswerving and impartial justice which has ever been the keystone in the arch of our Government.

Yours, respectfully,

JOSEPH P. LYONS,  
*Assistant Corporation Counsel,*

BOSTON, MASS., March 3, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Judiciary Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: By way of introducing myself, I have been in the general practice of law for about 10 years, and have been identified with the Democratic Party since 1896; have also been a delegate to the Democratic National Convention at Denver and an alternate delegate to the Baltimore convention. I am at present connected with the law department of the city of Boston, having charge of the "Workmen's compensation" cases.

My practice and connections have brought me in contact with a very large majority of the practicing lawyers of Boston and Massachusetts, generally, and I am delighted to say that I find the reputation of Louis Brandeis to be excellent, as far as honesty and ability are concerned.

I most heartily approve of his confirmation as a member of the United States Supreme Court.

Respectfully, yours,

H. MURRAY PATSUKKI.

FEBRUARY 28, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I should like to add my indorsement to the nomination of Louis D. Brandeis, Esq., as Associate Justice of the Supreme Court of the United States.

I am a graduate of Harvard College, 1908, and Harvard Law School, 1910, and have been a member of the Massachusetts bar since January, 1910. For two years after leaving the law school I was in the legal department of the Boston Elevated Railway Co. and for the past three years have been assistant to the general attorney of that company and engaged in the general practice of the law. I have known Mr. Brandeis personally for the past seven or eight years and I believe that I am familiar with at least his public career of the past 20 years. Although I have been intimately interested in the opposite side of many public, particularly franchise questions in which Mr. Brandeis has taken an important part, I have always felt and do still feel that he is a man of absolute integrity, exceptional ability and mentality, and unusual fairness.

I believe that I voice the general sentiment of the younger members of the bar when I say that Mr. Brandeis is a shining example of the unselfish, public-spirited citizen, earnest advocate, and profound scholar.

Very truly, yours,

W. E. PINANSKI,  
*Assistant to the General Attorney.*

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I trust that there is no impropriety in the liberty I am taking in writing you this letter indorsing Louis D. Brandeis as an Associate Justice of the Supreme Court of the United States.

I am now and have been practicing law in Boston for 16 years. I was assistant district attorney in Suffolk County in 1909, and in 1906 was appointed a special justice of the Boston juvenile court, a life appointment.

I have known Mr. Brandeis, or of him, since I commenced the practice of the law. I have had matters connected with his office, although I have not dealt with him personally therein.

It is not unnatural that many should differ with Mr. Brandeis. His career has been exceedingly active and fruitful, and it would be impossible to expect that his acts should meet with the commendation of all. I can not believe, however, that the present opposition is viewed with favor by the great mass of our community. To them Mr. Brandeis towers as a man of great intellect and energy, who has unselfishly served the people, and who has accomplished large constructive good in their behalf.

I believe that Mr. Brandeis is preeminently fitted for the position, and, as far as one can foresee, will add genuine strength to the Supreme Court. The President has assumed the responsibility of making the appointment, and I believe he has exercised sound judgment. I hope the United States Senate will see fit to sustain the President in the matter.

Yours, very truly,

PHILIP RUBENSTEIN.

BOSTON, March 2, 1916.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

MY DEAR SIR: Permit me to express my approval of the nomination of Louis D. Brandeis, Esq., as a member of the Supreme Court Bench of the United States. I sincerely trust that your committee will see fit to report favorably on the nomination to the honorable Senate.

I have been engaged in the practice of law for three years, and during that time I have had occasion to discuss the honesty, integrity, and ability of Louis D. Brandeis, Esq., at various times, and the sentiment of opinion always expressed was that he was a credit to our profession, and it is my sincere belief that his appointment to the Supreme Court Bench will add to the same a man who had not only himself at heart but his country and people.

Sincerely, yours,

ISRAEL RUBY.

BOSTON, March 2, 1916.

Senator WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: In reference to the confirmation of Louis D. Brandeis as a member of the Supreme Court of the United States, now pending before your committee for its consideration, I desire to be placed on record as follows:

I might say at the outset that I am in my fifth year at the bar, active in practice, and of the large number of lawyers with whom I have come in contact, a very large majority are in favor of confirmation of the nominee.

I do not personally know him, but so far as I can ascertain—and I have discussed the matter with a number—his reputation at the bar for ability, efficiency, and integrity is good.

I desire to be recorded in favor of confirmation.

Very truly, yours,

JOSEPH H. SAMUEL.

[Law offices of Eugene M. Schwarzenberg and Edwin F. Schwarzenberg.]

BOSTON, MASS., February 25, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: AS a member of the bar of 12 years' standing and one who has participated somewhat in civic life, having been chairman of the good government association of the town in which I lived for several years, as well as a member of the Republican town committee and town council, I feel it my duty to write to express my position on the treatment being accorded to Mr. Louis D. Brandeis.

I have known Mr. Brandeis, both socially and professionally, for upward of 20 years, and have had a great many dealings with him personally and with his office, and have always found him conscientious, upright, and a man of highest integrity, high ideals, and fine ethics, besides which his ability can not in the least degree be impugned.

I wish to express my unqualified approval of his appointment as a member of the United States Supreme Court, believing that his appointment will add dignity and strength to that body. It is my belief, from what conversations I have had with other attorneys, that the only opposition to him in this section comes from a very narrow circle who are allowing selfish motives to warp their judgment.

With the sincere wish that the action of the committee will be favorable to Mr. Brandeis, I am,

Yours, respectfully,

MARCH 3, 1916.

Senator WILLIAM E. CHILTON,

*Chairman of the Subcommittee, United States Senate,*

*Washington, D. C.*

DEAR SIR: It is with a great deal of regret that I note the opposition against the confirmation of Louis D. Brandeis as Associate Judge of the Supreme Court of the United States. Personally, I think it is a misfortune to harass and malign a man who, to my judgment, in the words of Shakespeare, "is above suspicion."

I have practiced law since 1904, and have had more or less to do with the office of Brandeis, Dunbar & Nutter, and there never came a time that I could find any fault with the treatment I received from that office.

Mr. Brandeis has been generally regarded as a man of great legal ability. Not only is he recognized as a leader at the bar, but is known as a man who has given a great deal of his time to work for the public good, and is, in a sense, accepted as a leader of men.

His honesty, character, ability, and his general and judicial temperament has never, to my mind, been questioned. Personally, I believe that those who oppose him do so not because he lacks ability or honesty, but because they recognize the superior man.

I believe that this country needs the service of a man of this type, and I am sure that time will make those who now oppose him ashamed of their conduct.

I sincerely hope that the committee will report favorably upon his confirmation.

Respectfully, yours,

SAMUEL SELIGMAN.

MARCH 2, 1916.

Hon. WILLIAM E. CHILTON,

*Washington, D. C.*

SIR: I most respectfully urge the confirmation of Louis D. Brandeis, Esq., as an Associate Justice of the United States Supreme Court. His sterling character, unquestioned ability, fearlessness when fighting for a just cause, and sincerity of purpose in protecting the weak and oppressed are a few of his qualifications which make him eminently fit for this position which he will hold with credit to himself and honor to his country.

Respectfully, yours,

HARRY SILVERMAN.

[Samuel L. Silverman, 40 Court Street. Boston.]

FEBRUARY 25, 1916.

Senator WILLIAM E. CHILTON,

*Chairman Subcommittee, United States Senate,*

*Washington, D. C.*

DEAR SIR: The nomination of Louis D. Brandeis, Esq., of Boston, as Associate Justice of the Supreme Court of the United States is, in my opinion, one of the best nominations that could be made.

I have been a member of the Massachusetts bar since 1899, and I have yet to hear any objection to Mr. Brandeis. It may be that I do not come in contact



with that class of attorneys who object to him. The feeling among the everyday members of the bar is that the nomination is a good one and will be a great credit to the United States.

I have had some business with Mr. Brandeis's office, and have found them fair and square.

I have served as a member of the Republican State Committee of Massachusetts for two years, and I have in past years actively participated in politics.

If you know anything about conditions in Boston you will know that the attorneys who oppose Mr. Brandeis are of a certain class who oppose everybody unless they come within their circle.

Very truly, yours,

SAMUEL L. SILVERMAN.

BOSTON, March 2, 1916.

Senator WILLIAM E. CHILTON,  
*United States Senate,  
Washington, D. C.*

DEAR SIR: I am interested in the confirmation of Louis D. Brandeis for the office of Associate Justice of the Supreme Court of the United States.

In the outset let me state that I am a practicing lawyer and have been in active practice for 22 years, and during that time have had daily business relations with a great many lawyers, business men, and a representative element of the general public of this community. From my experience and personal knowledge I find the bar of this city has among its members several men that seem to possess very deep-seated prejudices along certain lines, that are the result of views expressed between themselves and within a somewhat limited circle. For reasons satisfactory to themselves, Mr. Brandeis has incurred the active opposition and personal ill-will of these men.

The standard that seems to have been set by these men for the general bar is of their own creation, unwritten, and, to my mind, very artificial and wholly out of sympathy with the rank and file of the 3,000 lawyers that practice before the courts of this city.

I do not claim to know the candidate, but can state for the information of your committee that the reputation and common speech of other lawyers and business men of this city consider Mr. Brandeis as a man who has elevated his character by his lofty and upright principles, according to a standard of honesty and reasonable application and who as a lawyer and practicing attorney has distinguished his profession by the result of his achievements.

I believe such a man to be fully capable of calmly weighing matters that might come before him for judicial interpretation, and a man that would do full credit to the high office to which he has been appointed.

Very truly, yours,

F. F. SULLIVAN.

FEBRUARY 24, 1916.

Hon. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I want to indorse President Wilson's nomination of Louis D. Brandeis for Associate Justice of the Supreme Court of the United States. I was a member of the Massachusetts Senate in 1907 and 1908 and was the Democratic candidate for governor in 1908 and 1909 and was also a delegate to the Democratic national convention in 1904.

I have been practicing law for 23 years, have always been a Democrat, and have known Mr. Brandeis for 15 years. I have never been associated with him in legal matters or causes, but have frequently been opposed professionally to his firm. While in the senate I was actively interested with him in the establishment of savings-bank insurance and voted for the bill which finally became a law.

I think that he is peculiarly well fitted and qualified for the position of Associate Justice of the United States Supreme Court. His knowledge of law and his breadth and grasp of great public and social questions remarkably fit him for such a high place. I think he has been very much misunderstood by some members of the bar here.

I earnestly hope that his nomination will be confirmed.

Yours, very truly,

JAMES H. VAHEY.

BOSTON, MASS., *March 3, 1916.*

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: In the matter of the appointment of Louis D. Brandeis I wish, as a member of the bar of Massachusetts, to express my confidence and trust in Mr. Brandeis's high character and great ability.

In the city of Revere, where I have my residence, I mix in politics and belong to a number of social clubs and political organizations. Discussing Mr. Brandeis's appointment, the unanimous opinion seems to be that the gentlemen from Boston who are opposing him belong to a class who are known as "blue bloods." The people hark back to a time in Massachusetts, not so very long ago, when Catholics of Irish descent met with similar opposition from the same class who are now opposing Mr. Brandeis. They believe that Mr. Brandeis and men of his race and religion are now facing the same kind of prejudice in their fight for recognition, not of "blue blood" but red blood, courage, ability, and character.

The people, and especially the young lawyers of Boston, who are perhaps more familiar with Mr. Brandeis's career and attainments, are waiting with confidence for the confirmation of Mr. Brandeis as a demonstration that the test for high public office in Washington is the test applied by Mr. Wilson and is not influenced by class, race, or religion, but is determined entirely by character and ability for the office.

Very truly, yours,

P. A. WALSH.

FEBRUARY 16, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: In view of the present discussion as to Mr. Louis D. Brandeis, will you permit me, as one who has known Mr. Brandeis ever since we were together in the Harvard Law School, to say in brief that, although I have not for many years been in active practice, I have had an opportunity to know something of Mr. Brandeis's work in public matters, and that he has shown, in my judgment, not only brilliant ability but public spirit, breadth of view, and generosity both in the matter of time and money in helping on the public work which he has undertaken. As to his integrity, I have entire confidence in it, and would intrust my own affairs to him without hesitation.

Respectfully, yours,

GEORGE WIGGLESWORTH.

MARCH 4, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate, Washington, D. C.*

DEAR SIR: I desire as a practicing attorney of this city, and in the interest of the community, to add my voice in commendation of the character and ability of Mr. Louis D. Brandeis, whose appointment as Justice to the Supreme Court is now awaiting the consideration of the Senate.

I sincerely trust he will be confirmed. I have followed Mr. Louis D. Brandeis's career with great interest, his professional and public activities are known by all men the country over, and I believe there is no one in point of ability or in character more fitted than he to strengthen the great court to which he has been appointed.

The reported sentiment of the Boston bar as unfavorable to Mr. Louis D. Brandeis is, I think, a great perversion of the truth, and it is limited almost wholly to those who have clients identified with vested interests and who are opposed to the measures advocated by Mr. Louis D. Brandeis. The disinterested members of the bar by an overwhelming majority respect him as a man of sterling worth and splendid ability.

Volumes might be written of his worth, but the main facts have already appeared in evidence, and I believe they should be conclusive to his remarkable worth and ability. It is certain that the great masses of the people, both lawyers and laity, will rejoice his confirmation, which is confidently expected.

I have the honor to remain,

Very respectfully, yours,

SAMUEL J. WITKIN.

[Law offices of Samuel L. Wolfson, 40 Court Street, Boston, Mass.]

FEBRUARY 29, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman subcommittee, United States Senate,*  
*Washington, D. C.*

DEAR SIR: I am an A. B., Harvard University, and LL. B., Boston University, and have been a member of the Massachusetts bar, Suffolk County, since 1913 and United States district court bar since 1915.

I have been for a great many years an ardent admirer of Mr. Louis D. Brandeis, because I believe him to be one of the foremost Americans of to-day and typical of American principles and democracy. I heartily approve his appointment to the United States Supreme Bench because I feel that he will stand up for what is equitable and just at all times and will make an excellent interpreter of the laws because of his vast legal experience.

I am of the opinion that the opposition to his confirmation is confined to a very small sphere, composed only of those who bear him a personal grudge and see a possible opportunity at hand to satisfy themselves, and it does not represent the voice of the people.

Respectfully, yours,

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A few miscellaneous letters from lawyers outside of Boston or from nonlawyers:

MARCH 30, 1916.

HON. WILLIAM E. CHILTON,  
*United States Senate, Washington, D. C.*

DEAR SIR: I am taking the liberty of mailing you under another cover copy of an article concerning Louis D. Brandeis, whom I have had the honor of knowing a great many years.

As a citizen of Massachusetts and a former candidate for the nomination of governor and former chairman of the commission of efficiency and economy, I beg to say that in my opinion there is no living American who is more honest and more fearless, and no man that I know has better judgment or is more patriotic.

There are many people in Massachusetts and elsewhere throughout the country who believe that Brandeis resembles Abraham Lincoln in appearance and in character.

Yours, sincerely,

NORMAN H. WHITE.

FEBRUARY 9, 1916.

HON. GEORGE E. CHAMBERLAIN,  
*Senate Chamber, Washington, D. C.:*

Urge the confirmation of Brandeis because he is able, just, and progressive. One of the best appointments President could have made. No one opposing here but reactionaries, special-privilege beneficiaries, and big-business representatives. Opponents here include all who were applauding in advance nomination of Taft as the graceful thing to do.

WILLIAM U'REN.

FEBRUARY 19, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Senate Subcommittee.*

DEAR SIR: The newspapers report that certain gentlemen from this vicinity have given your committee an unfavorable estimate of the character of Mr. Louis D. Brandeis and of his standing in the community.

I think it is fair to say that the hostile estimates attributed to these gentlemen are not unexpected and occasion little surprise in his locality. We are accustomed to having honorable men, of strong convictions and divergent interests, differ painfully in their estimates of one another. But I think it is also fair to say that these critics of Mr. Brandeis can not speak for the community at large.

I, for example, have known both Mr. Brandeis and some of his critics for many years. Part of this time I was a member of the faculty of Harvard University, as teacher of political economy and sociology; subsequently colleague and successor of the late Edward Everett Hale as minister of the South Congregational Society of Boston. The longer I have known Mr. Brandeis the more I have admired him, not only for his personal qualities but also for his knowledge of economic conditions; his insight and impartiality in regard to the relations of capital and labor; his public spirit and devotion to the general welfare.

I regard him as one of the most conscientious members of his great profession; as one of the sanest, wisest, and most trustworthy citizens of this Commonwealth.

I was glad when the President nominated him to the Supreme Court; first, because I, like many others, am persuaded that he measures up to the highest standards of moral character, of professional equipment, of judicial temper, of patriotic devotion; second, because I believe he will bring to his high office a statesmanlike grasp of the fundamental principles and problems of our social, political, and industrial life.

Sincerely, yours,

EDWARD CUMMINGS.

P. S.—I think I am not identified with Mr. Brandeis either in race, religion, or political party.

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ANDOVER THEOLOGICAL SEMINARY,  
Cambridge, Mass., February 17, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee of the Senate.*

DEAR SIR: May I be allowed the privilege of expressing to you my appreciation of the character and service of Mr. L. D. Brandeis and my judgment of his eminent fitness for the great position for which our honored President has chosen him. I have known Mr. Brandeis for more than 20 years; I have heard him speak on many occasions on large questions, and have been brought into personal relations with him from our mutual interest in the welfare of workingmen. He has impressed me profoundly as a man of sterling character, absolutely devoted to the common welfare, thoroughly convinced that righteousness alone exalteth a nation, and so eager that good be accomplished that he willingly works in the background while others receive the commendation.

In view of the fact that great social problems are coming more and more to the Supreme Court, it seems to me that he is eminently fitted for wise and humane judgment on these and other matters. From my contact with various classes of men in the community, I judge that his selection strikes others, with the exception of a small minority, as favorably as it does me.

Yours, respectfully,

DANIEL EVANS.

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BOSTON, MASS., February 25, 1916.

Senator WILLIAM E. CHILTON,  
*Chairman Subcommittee, United States Senate,  
Washington, D. C.*

DEAR SIR: I am writing you to throw what light I can upon the qualifications of Mr. Louis D. Brandeis for service in the Supreme Court. I have never had any business relations with Mr. Brandeis, but have been a close observer of his activities, both locally and nationally.

While I have no authority to speak for any organization with which I am connected, I think it fair to say that because I am connected with various public organizations in this vicinity I have come to know what kind of a man Mr. Brandeis is. As one of the organizers and president of the United Improvement Association, an affiliation of the various local associations of citizens throughout Boston, I have been associated with Mr. Brandeis and have seen his breadth of view and self-sacrificing contributions of time and money in the interests of the best civil development. As superintendent of the Wells Memorial Institute, I have become acquainted with his energetic and again self-sacrificing work in the upbuilding of our Massachusetts Savings Bank

Life Insurance system. As director of the Boston Chamber of Commerce and an active member of various of its committees, I have had an opportunity to know of Mr. Brandeis's activities in connection with the New York, New Haven & Hartford Railroad. He has received much censure for his actions in this connection, and I believe that much of the opposition to him now is based upon that. Let me assure you that such opposition is confined to a very small group of people, though the members of that group are wealthy men whose voices are heard afar. Because Mr. Brandeis discovered the evil financial and managerial situation of the New Haven Railroad and warned the public of it and of the need of an early and drastic remedy, he has been blamed as only the authors of the situation deserve. He is charged with the wrecking of the New Haven Railroad when what he really did was the very useful service of warning us that the railroad would be wrecked unless we took effective means to prevent such a catastrophe. One of our most prominent business men said to me very recently that he believed the opposition to Mr. Brandeis regarding the New Haven activities, which comes largely from the banking interest, is due to the fact that he discovered and made public the real situation of affairs before the bankers themselves had discovered it. It is my deliberate opinion that had Mr. Brandeis not made public the facts regarding the New Haven situation that debacle might have been even more serious than it is.

Finally, may I say that I believe the personal charges against Mr. Brandeis are due to the fact that he refuses to continue as counsel for a company after he becomes convinced that that company is working contrary to the public interest and demands his assistance in securing results which work against essential justice? Such a position is not in keeping with the general practice in the legal profession and is not required by legal ethics. In my opinion, however, it is a step in advance of what is absolutely required by the ethics of the profession; and I believe that in taking such a position he is standing for the higher morality rather than the lower ethics of the particular group. Not being a lawyer, I can not express any opinion of value as to Mr. Brandeis's purely legal contribution to the Supreme Court, but I do know that his intimate knowledge of the actual living conditions and problems of a great majority of the inhabitants of this country will be of inestimable value in giving a human and humanitarian balance to the views of the Supreme Court.

Respectfully, yours,

WILLIAM C. EWING.

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60 STATE STREET, BOSTON, MASS.,

February 17, 1916.

HON. WILLIAM E. CHILTON,

*Chairman of Subcommittee,*

*United States Senate, Washington, D. C.*

DEAR SENATOR: I write to urge the pending confirmation of Louis D. Brandeis. I am one of those citizens of Massachusetts who conceive Mr. Brandeis to be a great civic asset and potentially a distinct national asset. To many minds he stands as the embodiment of popular intelligence and courage striving for popular rights against selfish corporate aggression. He has a definite record of public achievement unequalled, I believe, by any other member of the bar in this State.

He is essentially a constructive and conservative element in the community, in that he believes in and assists orderly and evolutionary social progress. He is a man with a social vision, but never visionary; a useful servant of the public, but never servile; a profound and brilliant lawyer, who knows that historically the best law is ever expressive of the noblest social aspirations.

Faithfully,

WILLIAM LLOYD GARRISON, Jr.

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FEBRUARY 17, 1916.

HON. WILLIAM E. CHILTON,

*Chairman Subcommittee,*

*United States Senate, Washington, D. C.*

DEAR SIR: Louis D. Brandeis is, in my opinion, absolutely devoid of all selfish interests. I do not intend to presume upon his dignity by defending

his character, but wish to say that during the last 10 years in which he has served as our counsel we have found him to be both conservative and constructive in his advice.

There are embodied in Mr. Brandeis so many of the essential elements that fit him for the Associate Justice of the Supreme Court it is inconceivable that any testimony presented should influence your committee to the extent of robbing this country of the power and quality of justice that Mr. Brandeis will administer.

It is my belief that we voice the opinion of the conservative element of the country.

Yours, very truly,

E. G. HOWES.

FEBRUARY 15, 1916.

MY DEAR SIR: Inasmuch as so many allegations by petition or personal statement have been presented to the subcommittee to consider the fitness of Mr. Brandeis for the Supreme Court, many of which allege that he is temperamentally unfit to act in a judicial capacity, may I take the liberty of contributing an opinion on the other side. My professional work at Harvard has for many years required that I keep in close touch with transportation and labor matters, and quite aside from personal acquaintance with Mr. Brandeis, it has been in the true line of my work to follow every detail of his career. Two particular events, in my judgment, prove that Mr. Brandeis, far from lacking the judicial habit of mind, is preeminently fitted to exercise it. The first of these is his attitude on the rate advance cases, wherein, as your committee has already been so fully informed, he was willing to so far do justice to both sides as to concede the need of revenue for the carriers while still fully comprehending the interest of the public, which he represented, in low transportation rates. As a warrant for this judgment, and merely in order to give it weight technically before your committee, I am taking the liberty of inclosing a few citations from reviews of certain books on railroads which I have published during the last few years.

The second instance of marked judicial capacity on the part of Mr. Brandeis is his record in the New York protocol, covering 50,000 or more garment workers, and substituting standardized and orderly conduct of a great business for chaos and incessant strife. The fact that Brandeis should have been chosen as the third member of the arbitration board, which was the capstone of the system, and should in that difficult position have continued to promote orderly intercourse between capital and labor, is no mean achievement. It could by no possibility have been performed by one who did not possess the qualities of fairness and nice discrimination as to human rights in the highest degree. On this subject also my warrant for expression of opinion is based upon a quarter of a century of instruction and writing on labor problems in connection with my work at Harvard.

You will pardon the length of this communication, but it is difficult more briefly to substantiate the claim which the friends of Mr. Brandeis bring forward in behalf of this candidacy.

Believe me, very truly, yours,

WILLIAM L. RIPLEY.

HON. T. H. WALSH.

FEBRUARY 21, 1916.

HON. WILLIAM E. CHILTON,

*Chairman Committee on Brandeis Nomination, Washington D. C.*

DEAR SIR: I take the liberty of placing before you copy of telegram which I sent to President Wilson immediately after the announcement of his nomination of Mr. Louis D. Brandeis to vacancy on the bench of the Supreme Court of the United States:

"The PRESIDENT,

*"Washington, D. C.:*

"Your nomination of Louis D. Brandeis affords renewed evidence of your sagacity, is a fine tribute to his splendid qualifications, and a gratifying recognition of the confidence in which he is held by the masses of the American people."

I may add that for several years I have been in position to gauge with some accuracy the views of the people of Boston as a whole and to contrast them with

those of a much more circumscribed local group mistakenly disposed to regard its own sentiments as those of the entire community.

Four men chanced to lunch together to-day at one table at one of our principal clubs. One is president of a prominent Boston savings bank, the second is a well-known lawyer occupying a high elective office, the third is one of the leading dry-goods merchants of Boston, the fourth (myself) is president of two flour milling companies. Among other matters the nomination of Mr. Brandeis was discussed. One suggested that those who favor his nomination hold up their hands and all four men held their hands aloft.

This is, I believe, much nearer a correct illustration of the views of the people of Boston—not to go farther from home—than was the petition recently signed here and forwarded for presentation to your committee.

If the matter were submitted to a vote of our citizens, among whom Mr. Brandeis has lived and worked the greater part of his lifetime, I believe the majority in his favor would be overwhelming.

Very respectfully, yours,

BERNARD J. ROTHWELL.

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[J. Russel Marble & Co., Worcester, Mass., also 77 Pearl Street, Boston, Mass. J. Russel Marble, Rufus S. Woodward, Charles E. Eager, Arthur E. Nye.]

WORCESTER, February 23, 1916.

HON. WILLIAM E. CHILTON,  
*Chairman Subcommittee Judiciary Committee,  
 United States Senate, Washington, D. C.*

DEAR SIR: As a merchant of Boston and Worcester, Mass., and doing a very considerable business with the principal paper, woolen, cotton, and other manufacturers of New England, I want to state that I believe that a large proportion of the people of New England approve of the nomination of Louis D. Brandeis for Justice of the Supreme Court.

I have met Mr. Brandeis frequently in lines of work which are for the uplift and benefit of the people. His ability is recognized and I believe that he has a large degree of judiciary temperament. He is the only lawyer, so far as I know, of any particular prominence who has appeared before the Legislature of Massachusetts in the last 10 years in the interests of the people as a whole. The other lawyers have been there, chiefly representing the interests of corporations, whose interests are sometimes inimitable to those of the people. The Hon. Robert M. Washburn, a Republican, and more than five years a member of the Massachusetts House of Representatives, now a member of the Massachusetts Senate, himself a lawyer, has approved publicly of Mr. Brandeis's confirmation, as per inclosed interview in the Worcester Evening Gazette.

Knowing Mr. Brandeis as I do, and the sentiment of the New England people, I believe the court would be strengthened by his confirmation, and the respect for the court, if possible, increased among a large part of the community.

Very truly, yours,

J. RUSSELL MARBLE.

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MARCH 3, 1916.

MR. A. LAWRENCE LOWELL,  
*President Harvard University, Cambridge, Mass.*

DEAR SIR: As a one-time member of the undergraduate body of the university, I feel that I owe it both to the traditions of that institution and to my own sense of duty to add my protest to that of the undergraduates who have challenged your opinion as stated to the Senate committee of the fitness of Mr. Louis D. Brandeis for service on the Supreme Court of the United States.

I have some personal acquaintance with Mr. Brandeis. I have a good working knowledge of his activities in the public behalf during the past 10 years. There is no man of his time, in my opinion, who has rendered as valuable service to the cause of humanity and progress. He is of Supreme Court stature at all times. Under the conditions that prevail to-day in the United States, I believe him to be peculiarly fitted for services on that bench. President Wilson has made no appointment in his career that so honored him as that of Mr. Brandeis. In such a situation, it shocks me that the head of our most illustrious educational institution should join the clamor of the privileged and predatory in-

terests of the country in defaming the reputation of this great lawyer and citizen.

Again I protest—for myself, for the old university ideals of truth seeking and service to humanity.

Truly, yours,

STILES P. JONES,  
Class of '88.

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HOT SPRINGS, ARK., March 12, 1916.

HON. JOSEPH T. ROBINSON,

*United States Senator from Arkansas, Washington, D. C.*

MY DEAR SIR: Mr. Malheny, a brother attorney and old schoolmate of yours, informed me that I might use his name as reference in writing to you relative to the confirmation of the Hon. Louis D. Brandeis for Supreme Court Judge, who was indorsed by our local painters' union, No. 401, and a copy of the resolutions sent to you and Senator James P. Clarke on February 22 by special delivery. I wrote Senator Clarke the second time, but have never received a reply to our resolutions nor my letters, and as I am originally from New England and also know ex-Secretary of the Interior Ballinger and many of the ring that attempted to hold up Uncle Sam in Alaska and know Mr. Brandeis did his whole duty in that case and rendered invaluable services to the United States Government and the people of our country and in that and other cases, and that a large majority of the laboring men and law-abiding citizens are in favor of your early action and confirming the President's appointment, I hereby again ask you and your colleagues to stay by us and we will stay by you.

Kindly acknowledge the receipt of this and let me know if you duly received a copy of our resolutions, and oblige your humble friend and servant.

E. E. NEAL,  
Box No. 28, Hot Springs, Ark.

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JOHN P. HERRMANN, JR., REAL ESTATE CO.,

*St. Louis, Mo., March 15, 1916.*

TO THE MEMBERS SENATE JUDICIARY SUBCOMMITTEE,

*Washington, D. C.*

HONORABLE SIR: The inclosed copy of my letter to Senator Elihu Root, a copy of which was mailed to Mr. Barnes, of New York City, explains itself.

With all due respect to the Hon. William Taft, the ex-President of the United States, I beg to call your attention to the fact that he was not above accepting the nomination at the hands of the 1912 so-called Republican convention, and that notwithstanding that the platform on which he was previously elected as President called for a revision of the tariff downward, that in place of that the people who had voted for him on that platform were given Canadian reciprocity instead of a revised tariff.

If the other gentlemen who are so strenuously opposing the confirmation of Mr. Louis D. Brandeis are in the same class, it might be well not to lay too much stress on their opinions as to his fitness for that high office. See inclosed editorial from Globe Democrat.

Trusting that you will receive this letter in the friendly spirit in which it is sent and will confirm Mr. Brandeis's appointment, I remain,

Very truly, yours,

A. F. HERRMANN, 1011 Market Street,  
Delegate to the 1912 Progressive Party Convention,  
And Chairman Twelfth Congressional District of Missouri.

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ST. LOUIS, February 18, 1916.

HON. ELIHU ROOT,

*New York City, N. Y.*

HONORABLE SIR: You will in all probability recognize the following matter as having been printed on postal cards which were received by various representative men of the so-called Republican National Convention held in Chicago in 1912.



"Rather than stain the nomination for the high office of President with fraud and theft, organize a Progressive Party with the Hon. Theodore Roosevelt as its head."

Now that your State, the Empire State, and your party, the Republican Party of your State, has spoken and given you to understand that they did not consider you fit timber to fill the position of President, the most honorable within the gift of the American people, I sincerely trust that the exalted opinion you had of yourself so dogmatically expressed and displayed while chairman of the national Republican Party convention held in Chicago in 1912 has somewhat diminished.

Might does not always make right, and in this case the lesson has been driven home to you by your own people in your own State.

While your nomination for the highest office was a possibility, your election to same is an absolute impossibility, as we, the Progressives in the western section of the United States, have always resented, nor will we ever forget and few of us ever forgive, the treatment you accorded to us while acting as chairman.

Trusting that your forced retirement to private life may be of a pleasant nature, I am,

Very respectfully, yours,

A. F. HERRMANN, 1011 Market Street,  
*Delegate to the 1912 Progressive Party Convention,  
 And Chairman Twelfth Congressional District of Missouri.*

FEBRUARY 18, 1916.

HON. WILLIAM E. CHILTON,

*Chairman of Senate Subcommittee, Washington, D. C.*

DEAR SIR: Kindly allow me to express my approval of the nomination of Mr. Louis D. Brandeis to the Supreme Court.

It has been my privilege to have had somewhat of an intimate acquaintance with Mr. Brandeis for more than a dozen years, during which time I have observed his work at close range, both in public and private affairs. I have found him to be a man who is keenly active in getting after exact and fundamental facts before making a statement regarding any matter in hand, and subsequent events have usually proved that his judgment has been sound.

I feel sure that his activities have been misinterpreted sometimes as involving a radicalism which he did not feel or express, but, on the other hand, his utterances and actions have been of great value to the community in which he has lived.

Yours, very respectfully,

CHAS. M. COX.

FEBRUARY 3, 1916.

HON. JOHN W. WEEKS,

*Washington, D. C.*

MY DEAR SENATOR WEEKS: Permit me to express the hope that you will not hinder the confirmation of Louis D. Brandeis even if you should find that you could not vote for him, which I sincerely hope will not be the case.

Yours, respectfully,

GEORGE W. COLEMAN.

FEBRUARY 3, 1916.

HON. HENRY CAROT LODGE,

*Washington, D. C.*

DEAR SENATOR LODGE: With all my heart I hope you will not find it necessary to oppose the confirmation of the appointment of Louis D. Brandeis. Nothing would please me more than to see you voting for him.

Yours, sincerely,

GEORGE W. COLEMAN.

MARCH 10, 1916.

MR. ELLERY SEDGWICK,

*Editor Atlantic Monthly, 4 Park Street, Boston, Mass.*

MY DEAR MR. SEDGWICK: The report in this morning's Herald of your suggestion to President Wilson of the social importance of Mr. Brandeis's appointment

is most encouraging. With other Harvard men I was mortified by President Lowell's part in a stupid and unfair protest. Such action as yours is welcome, for it sets us right in the eyes of people throughout the country who have been criticizing Bostonians in general, rather unjustly, for the sad showing we made when one of our greatest citizens was given the recognition due him, and recognition is something Mr. Brandeis has never sought. Over the long-distance telephone some of the foremost social workers in New York told me of their indignation at the character of the protest emanating from this city. Fortunately we got every social worker in Boston to sign a petition showing how Mr. Brandeis really stands with the people and with those who are close to the people in this city. Those of us who regard the *Atlantic Monthly* as an expression of the best in democratic thinking find in your action a new satisfaction in our allegiance.

Sincerely, yours,

MEYER BLOOMFIELD.

CAMBRIDGE, MASS., February 18, 1916.

Hon. WILLIAM E. CHILTON,  
*Chairman Subcommittee of Judiciary,*  
*United States Senate, Washington, D. C.*

DEAR SIR: The writer of this letter is a clergyman of the Congregational denomination of over 25 years' standing, most of it in actual service in the Commonwealth of Massachusetts; a graduate of Harvard College and most of his ministry spent within the limits of the city of Boston. From the ministry he went to the professorship of Applied Christianity at Tufts College, and for several years now has been engaged purely in private literary and educational activities. You will find his history in *Who's Who* for 1914-15, up to my resignation as professor at Tufts, since which I have engaged in writing educational books. I am personally known to Senator Hollis, Senator Gallinger, and Senator Weeks. Any of these gentlemen can give you light as to my standing. I think this is also true of Senator Clapp, whom I knew early in my career.

In these many years in Massachusetts I have also been something of a publicist and have engaged in many public activities of the nature of social and political reform, the results of which are embodied in my book on "Christianity and the Social Rage." My views on present movements, as they respect courts and judges, will be found in that volume very fully set forth in the chapter entitled "Social Justice on the Curbstone." I think this is sufficient for identification.

I am writing concerning Mr. Louis D. Brandeis. I have known Mr. Brandeis for nearly 16 years, being first attracted to him because of his activities as they related to sociological reforms in which I was interested. I became more closely acquainted with him in the campaign for savings-bank insurance for poor people in this Commonwealth and have kept more or less in touch with him and his activities during this entire period.

In the last 10 years I have lectured extensively in this State, and often speak in the course of a season to between 5,000 and 10,000 people of all kinds and types throughout the Commonwealth. I think I am in a position to know the public estimation of the man as well as almost any man in the State, and perhaps better than most, and I am writing to say that I am myself in favor of his confirmation as a Justice of the Supreme Court, and believe that the vast mass of the people of this Commonwealth, if they were permitted to express an opinion, would be found equally desirous of such action on the part of the Senate. I believe that more than any other man in the State Mr. Brandeis represents the feeling of liberal-conservative men as being a true and honorable embodiment of what has come to be known as "sociological jurisprudence." I believe that confidence in him is general, and perhaps even greater, because of some of the enemies which he has made, some of whom have appeared before your committee. The confirmation of Mr. Brandeis would reassure the people of this State and, as I believe, of the United States that a public man devoted to the popular interest—meaning thereby the public interest as against private and privileged interests—will not debar him from the highest service of the country. His rejection would be a distress signal which would, in my judgment, be damaging to the courts of the land already under fire in all parts of the land.

I think I am in position to understand and properly characterize the opposition to him from Boston and vicinity. It would not be fair to say that it was

racial. It would be fair to say that if any man bearing an old New England name and practicing at the bar in Boston had everything which is alleged against Mr. Brandeis—alleged against him—and were nominated for the Supreme Court, nobody would dream of raising these questions. Many of the interests represented by the protesting gentlemen are now, and have been ever since I have resided in this Commonwealth, against any emergence into public influence and power of anybody not of their number and clan. This is the simple truth.

Long and unchallenged control of everything in the Commonwealth has given many of these gentlemen the perfectly natural feeling that whoever is not approved by them is ipso facto a person who is either "dangerous" or lacking in "judicial temperament." I have met this in almost every form at public hearings of the legislature, of which I have attended a great many. It appears not merely in matters like this, but hardly less in philanthropies, the administration of public institutions, and many other forms of public activity. They simply can not realize, and do not, that a long New England ancestry is not *prima facie* a trusteeship for everything in New England. That is, in my judgment, the real spring of most of the opposition, though it must be recognized that it is entirely sincere, and the more sincere because never brought to the bar of critical review.

Doubtless your attention has been called to a recent editorial in the Boston Post entitled "A close petition," showing the comparatively narrow range of this opposition. I desire to affirm to your committee that if most of these people were brought into any public relation, as most of them have not, where a popular estimate of them could be registered the verdict would be so overwhelmingly against them as to leave no doubt in the mind of any reasonable person of the restricted area in which they operate. I believe the real feeling of this community is one of high regard, amounting in some cases to idolized devotion to Mr. Brandeis as a type of man who will bring both honor and justice to the Supreme Court of the United States. They love him for the enemies he has made.

In my personal associations with Mr. Brandeis I have always been impressed with his sincerity, his uprightness of view, and his devotion to his cause. I believe that as a Justice of the Supreme Court of the United States he would adorn the bench and add to the glory and renown of the greatest court in the world.

Respectfully, yours,

A. A. BERLE.

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TO THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE  
OF THE UNITED STATES SENATE,  
Washington, D. C.

GENTLEMEN: We, the undersigned ministers of Congregational churches in Greater Boston, as public-spirited citizens, hereby express to you the esteem in which we hold Mr. Louis D. Brandeis for his great service in behalf of the workers of the country and for the valiant fight which he has so successfully made for civic and corporate righteousness. We wish to bear witness that Mr. Brandeis was bitterly attacked several years ago for an address which he delivered before the Boston ministers' meeting. At that time, in the interests of fairness, we opened our platform to his opponents, that they might reply to his address and answer any questions which might be asked. This offer was declined. In view of the facts, we are glad that time has vindicated Mr. Brandeis in the position which he maintained before our body.

We sincerely trust that attacks from prejudiced quarters will not be allowed to defeat his confirmation as Associate Justice of the Supreme Court of the United States, and that unless evidence of unfitness not now known is produced, he will be so confirmed.

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We, the undersigned social workers in Greater Boston, desire personally to go on record in favor of the appointment of Mr. Louis D. Brandeis to the United States Supreme Court.

In the field of social progress—wherein we have had an opportunity to observe and measure Mr. Brandeis's usefulness—we know that his interest and untiring service in connection with the adjustment of labor differences, his so-

cial insight, breadth of mind, and unselfish devotion have won him the confidence and respect of hosts of people in this community and elsewhere. To our thinking, he has given evidence of possessing a knowledge and point of view in regard to present-day social conditions which should make him a most useful member of the Supreme Court.

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[The Pilgrim Congregational Church, Magazine Street.]

CAMBRIDGE, MASS., *February 22, 1916.*

Senator CHILTON,  
*Washington, D. C.*

HONORED SIR: Pardon a few words on the Brandeis appointment now before you for hearing and report.

Many of us hereabout are delighted that the President has done the exceptionally good thing in his appointment of Mr. Brandeis, and we earnestly hope that your honorable committee will recommend that the Senate confirm the same.

At the time of the country-wide discussion of the New Haven Railroad matter, and when the public mind was agitated by it, our Boston ministers' meeting heard Mr. Brandeis, who presented the subject from his point of view with great fairness, abundant evidence, and brimful and overflowing thoroughness. His presentation was not answered openly, though his opponents were urgently invited to reply before our meeting. The only reply was a printed attack on the man, which was sent to all our ministers. Being cognizant of these facts I fear that some of those now attacking Mr. Brandeis, were they and their methods under investigation, would hardly stand the light of day. Big business is surely more fully represented on the bench of the Supreme Court already; why should not the common people have on that bench such an eminent example of love for the public weal?

I have the honor to be, cordially and sincerely, yours,

RICHARD WRIGHT,  
*Pastor Pilgrim Church.*

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BRUNSWICK, ME., *March 6, 1916.*

Hon. CHARLES F. JOHNSON.

DEAR SIR: I concede that a Senator's conscience should, and in your case will, determine his official act.

I am aware that the sentiment of a single constituent may not be entitled to much consideration and I have hesitated to address you on the subject of this letter; but I have reflected that my sentiment may perhaps offset that of another.

I hope that you will vote for the confirmation of Mr. Brandeis. I think the definition of "a judicial mind" in our political dictionary should not be "one that stands between corporate rascality and the dispensation of justice."

I hope that in future years you may have the satisfaction to reflect that you have helped to make one of the greatest and purest judges of that great court.

Sincerely, yours,

HENRY F. THOMPSON.

## NOMINATION OF LOUIS D. BRANDEIS.

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JUNE 1, 1916.—Ordered to be printed and injunction of secrecy removed.

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Mr. CLARK of Wyoming, from the Committee on the Judiciary, submitted the following

### VIEWS OF THE MINORITY.

[To accompany the nomination of Louis D. Brandeis.]

This nomination was referred to a subcommittee for hearing and investigation. Full hearings were had in open session and every opportunity given to all to appear and be heard either for or against the nominee. The evidence and proceedings of the subcommittee, including separate reports of its members, have been printed and a favorable report on the nomination of the appointee, by the full committee, has been ordered by a vote of ten to eight.

In view of the extreme importance of the appointment and the remarkable conditions disclosed at the hearings the minority members of the committee feel it to be a duty resting upon them to state their views and their reasons for believing that the nomination should not be confirmed.

We concur in the views expressed and the conclusions reached in the separate reports of Senators Cummins and Works of the subcommittee. Their reports are so full and ample that it is unnecessary now to enter into any extended review of the evidence. We make those reports a part of the views of the minority and annex them hereto and make them part of this minority report.

In addition to this we think it just and right to call the attention of the Senate to the important features of the evidence adduced before the subcommittee and to summarize in a brief way the vital things established by the evidence.

There were twelve separate and distinct charges made against the nominee affecting his conduct, standing, and reputation as a lawyer and his fitness for the high office for which he had been nominated. Besides this, proof was offered of his bad reputation amongst the lawyers of the Boston bar of which he was and had been a member for many years. In addition to this numerous protests, signed by men of high character, including lawyers and others, based upon

the claim that he is unreliable and untrustworthy were submitted to the subcommittee. There were seventy-seven of these protests signed by leading and well known citizens.

Again, the subcommittee had before it a protest signed by William H. Taft, Simeon E. Baldwin, Francis Rawle, Joseph H. Choate, Elihu Root, and Moorfield Storey, as follows:

The undersigned feel under the painful duty to say to you that, in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.

The signers of this protest are among the leading and most highly respected lawyers of the country and each of them had been president of the American Bar Association of which Mr. Brandeis was, and had been for many years, a member.

To summarize the evidence given before the subcommittee, we submit that it establishes against the nominee:

1. That in a most important proceeding before the Interstate Commerce Commission he was appointed to represent the public side of a vital question and without conferences with or warning to other counsel upon the same side he joined the railroad companies in asserting that the existing revenues were insufficient thereby betraying the public interest and imposing upon the producers and consumers an unjust burden of millions of dollars every year.

2. That, after serving a client and upholding and defending its manner of doing business and the form of its contracts with its customers, he, in the interest of its competitors in business, and, as he claimed, in the public interest attacked the former client and assailed the same contracts he had approved and defended, denounced them as in violation of law and endeavored to secure legislation against them.

3. That he made believe that he was appearing and contesting these contracts in the public interests and without pay when he was acting directly for and in the interest of private individuals, and his firm, other than himself, accepted and received a large fee for the services rendered by him in this behalf.

4. That he took employment from a client, advised him to make an assignment for the benefit of his creditors, had his own partner appointed the assignee and afterwards denied that he had ever been employed by the client. That at the time he took the employment and gave the advice he was the attorney of one of the largest creditors of the client and for whose benefit the assignment was made, and in connection with the question whether the assignment should be made or not, was advising another of the large creditors. That later he repudiated his employment by his client and prosecuted a petition in bankruptcy against him alleging, as an act of bankruptcy, the making of the assignment that he himself had advised him to make. Out of this course of conduct he made for himself and his firm fees amounting to \$43,852.

5. That in the Glavis-Ballinger case he appeared for Glavis pretending to act without compensation and in the public interest when he was acting for and in the interest of a private corporation and was paid for his services a fee of \$25,000.

6. That he for a long time represented and collected fees from two clients whose interests were diametrically opposed to each other and

when they, later, went to law over those same conflicting interests he took employment for one of them against the other.

7. That he took employment in the fight for control of the Illinois Central Railroad, to secure proxies for one of the parties by which in part proxies sufficient to control the election of officers by his client were procured, and afterwards he denied having acted in the matter.

8. He took employment in the prosecution of actions against the New England Railroad Company the object of which was to wreck the road and put it under the control of his client. The actions were not prosecuted in the name of his real client but in the name of dummy plaintiffs who were paid to bring the action by the real party in interest whose identity was purposely concealed. The object intended was accomplished by this means and the New England road was absorbed and taken over by the New Haven.

9. That in the case of the Equitable Life Assurance Society he acted for and in the interest of some of the policyholders, without pay, and in the public interest, and made charges against the Society of misuse and misappropriation of funds and other wrongs. And at this very time he was the attorney for the Society in a number of cases, and later, an action was brought against the Society by one of the policyholders who alleged in his complaint the very wrongful acts that he had denounced in the public interest, to which he filed a sworn answer for the Society denying that it had ever committed the wrongful acts with which he had charged it.

10. That in the merger case, while holding himself as acting as a disinterested representative of the public, he was really acting in the interest of a private individual and himself paid the other members of his firm a fee of \$25,000 for the services rendered by him, thereby recognizing and treating the service as rendered for a client and not for the public.

11. That he was employed by certain liquor dealers as a paid lobbyist to prevent the passage by the legislature of his state of a bill detrimental to their interests.

12. That he has, on different occasions appeared before Committees of Congress urging legislation against combinations and trusts and among others, has vigorously denounced the so-called chain store combinations, but notwithstanding, he accepted employment as counsel to convince the Department of Justice that the persons who promoted and brought about the merger of the Riker & Hegeman Company chain of drug stores with the United Drug Company's chain of stores and upwards of 3,500 agents of the National Cigar Stands Co. should not be prosecuted under the anti-trust laws, a prosecution which the district attorney had already determined would be justified.

This last charge is not covered by the reports of the subcommittees, for the reason that the evidence was taken on a re-reference to the subcommittee for that purpose after those reports were made. It will appear from this evidence that Mr. Brandeis for some time had actively assisted the so-called American Fair Trade League in an effort to bring about the adoption of the Stephens-price maintenance bill which the League has advocated as a means of defense to the small retailer against chain stores.

At one of the hearings before the House Committee on Interstate Commerce, Mr. Brandeis contended that price maintenance "pre-

serves the small retailer as against the great chain stores." In an article which was submitted at these hearings, which Mr. Brandeis wrote for Harper's Weekly entitled "Cutthroat Competition," he said, that without price maintenance manufacturers would "combine with existing chains of stores," or establish "new chains of retail stores." This he declared would be an unmitigated evil. He said, "the process of exterminating the small independent retailer already pressed by capitalistic combinations—the mail-order houses, existing chains of stores, and the large department stores—would be greatly accelerated by such a movement."

An examination of what Mr. Brandeis has written and said upon the subject will disclose that his attitude has been one of vigorous opposition to the chain store system.

In September of last year negotiations were set on foot looking to a merger of the United Drug Co. of Massachusetts, a \$20,000,000 corporation, which also controlled a large number of stores. The Department of Justice, through District Attorney George W. Anderson (who, it may be said in passing, represented Mr. Brandeis before the subcommittee), entered upon an investigation to determine whether or not this merger would violate the antitrust laws. Mr. Anderson came to the conclusion that it would be in violation of these laws. Mr. Brandeis was employed to present the matter to Mr. Anderson in behalf of the merger and filed an elaborate brief with Mr. Anderson in an effort to convince him that the proposed merger was lawful.

We quote from the evidence taken before the subcommittee as follows:

Mr. Louis K. Liggett testified in part as follows:

Senator WORKS. Mr. Liggett, what is your business?

Mr. LIGGETT. Manufacturer and retailer.

Senator WORKS. Of what?

Mr. LIGGETT. Drugs.

Senator WORKS. With what companies are you connected?

Mr. LIGGETT. The United Drug Co. as president, and chairman of the board of directors of the Liggett Co.

Senator WORKS. What is the connection between these two companies?

Mr. LIGGETT. That of parent and subsidiary company.

Senator WORKS. What do you mean by that?

Mr. LIGGETT. The Liggett Co. is a direct subsidiary of the United Drug Co., the United Drug Co. owning all the capital stock of the Liggett Co.

Senator WORKS. What other companies are connected with the Liggett Co. or the United Drug Co.?

Mr. LIGGETT. Several more subsidiary companies—the United Drug Co. (Ltd.) of Canada, the National Cigar Stands Co., of New York, the Guth Chocolate Co. of Baltimore, the Ballard Vale Springs Co., the United Candy Co., and the United Pharmaceutical Co. To the best of my recollection that is all.

Senator BORAH. Does the parent company control all the stock of all these subsidiary companies?

Mr. LIGGETT. It owns all the stock of all these companies with the exception of a small amount of preferred stock in the United Drug Co. (Ltd.) of Canada a small amount of preferred stock in the Guth Chocolate Co., and a small amount of the preferred stock of the Ballard Vale Springs Co. It owns all the common shares of all the companies.

Senator WORKS. I have here a memorandum of some alleged facts relating to the connection between these companies, and I want to call your attention specifically to these statements, so that you may either verify them or correct any mistake in connection with them.

It is said, first, that the merger of the Riker & Hegeman Co. chain of drug stores and the United Drug Co. brings under the same control nearly 200 retail



drug stores and 3,500 agents of the National Cigar Stands Co. affiliated with the United Drug Co. Does that state the facts about correctly?

Mr. LIGGETT. A little less number of retail stores; about 153 is correct.

Senator WORKS. Instead of 200?

Mr. LIGGETT. Instead of 200.

Senator WORKS. How about the agencies—3,500 agents?

Mr. LIGGETT. I could not give the exact number offhand, but it is approximately correct.

Senator WORKS. Then, again, it is stated that the United Drug Co. of Massachusetts was a \$20,000,000 corporation which controlled the United Drug Co. of New Jersey, the F. L. Daggett Co., the National Cigar Stands Co., the L. K. Liggett Co., the United Drug Co. (Ltd.) of Canada, and owned substantial holdings in the Hanson-Jenks Co. and Ballard Vale Co., and had working arrangements with approximately 7,000 other stores throughout the country, and through its cigar department, operated by the National Cigar Stands Co., had 3,500 agencies in various parts of the country. Does that state the facts correctly prior to the final merger that took place?

Mr. LIGGETT. Approximately correctly.

Senator WORKS. Then, again, it is stated that the Riker & Hegeman Co. is a \$15,000,000 corporation organized in 1912 to take over the chain of stores of William B. Riker & Co., Hegeman & Co., and the Jaynes Co., and owned and operated over 100 stores in New York, Brooklyn, Boston, Hartford, Newark, Philadelphia, Pittsburgh, Washington, and other eastern cities. Does that state the facts correctly?

Mr. LIGGETT. As far as I know.

Senator WORKS. How far do you know?

Mr. LIGGETT. I was not a member of their organization, and I can not state that in 1912 they did take over those businesses.

Senator WORKS. You have become connected with some of those corporations since?

Mr. LIGGETT. We have taken over what was the Riker-Hegeman Co. as it existed at the beginning of this year.

Senator WORKS. We will come to that directly, I think.

It is stated that in 1913 the control of the Riker & Hegeman Co. stock was acquired by the United Cigar Stores Co. interest, headed by George J. Whelen, and the stock of the company was put into the corporation for R. H. stock which Mr. Whelen and his associates controlled. Mr. Whelen took active charge of the Riker & Hegeman affairs and a number of Mr. Whelen's strongest associates in the United Cigar Stores Co. came over and took hold of the managements of the Riker & Hegeman Co. What is the fact as to that?

Mr. LIGGETT. My information is to the effect that the United Cigar Stores Co. as an organization had nothing to do with that; that it was simply an individual promotion plan of Mr. Whelen's; that the stock of the Delaware corporation, known as the R. H. Corporation, was not largely held by stockholders of the United Cigar Stores Co. but rather by independent stockholders, and I believe that to be true, because in the purchase of the business I had to check their stock lists. By long odds a majority of the stock was held by investors.

Senator WORKS. Then we will go to the next statement.

In September of last year it was announced that the United Drug Co. interest was negotiating with Mr. Whelen, of the United Cigar Stores, and his associates for the control of the Riker & Hegeman chains. On October 17 it was announced that the transfer had been arranged and that a special meeting of the Riker & Hegeman stockholders would be called to ratify the merger. What is the fact about that?

Mr. LIGGETT. That is about correct.

Senator WORKS. Then again, soon after it became public that the Department of Justice was investigating the Riker & Hegeman chain of stores to determine whether prosecutions should be begun under the Sherman Antitrust Act on the complaints which had been coming into the Department of Justice from independent retail druggists of different parts of the country. Had you notice of any such investigation being made by the Department of Justice?

Mr. LIGGETT. No; my only notice came through the action of Mr. Anderson, the district attorney in Boston, and I rather have assumed and believe it to be the fact that this was initiated by him, not on complaints but rather purely on his own initiative.

Senator WORKS. When were you first made aware of the fact that Mr. Anderson was investigating the situation?

Mr. LIGGETT. The 1st of October.

Senator WORKS. What was the state of the negotiations which finally resulted in the ultimate merger, when you first learned of that fact?

Mr. LIGGETT. As far as the principals controlling the majority of stock of the company was concerned the agreement has been made between them.

Senator WORKS. Then, again, it was then claimed that the proposed merger of the Riker & Hegeman Co. with the United Drug Co. would combine retail interests estimated to be doing an annual business of \$30,000,000, and that the matter was being investigated by the Attorney General. What was the fact about it, as to the interest that would be included if the merger took place?

Mr. LIGGETT. The volume of retail business for the year 1915, when the business was conducted separately, would of course have made the combined business approximately \$20,000,000, not \$30,000,000.

Senator WORKS. How many different stores would be included in the merger?

Mr. LIGGETT. One hundred and fifty-three.

Senator WORKS. Where? Located in how many different States?

Mr. LIGGETT. Located, the largest number, in New York City in one group; the second largest in the New England States, including all States of New England, excepting Vermont, and having but one store in New Hampshire and three stores in Maine. The rest of the business was distributed in New York State, largely in the principal cities along the New York Central Railroad; a few in Pennsylvania, three being in Philadelphia and two in Pittsburgh, one in Scranton, one in Wilkes-Barre, and one in Lancaster; one in Washington, and three in Detroit.

Senator BORAH. Washington, D. C.?

Mr. LIGGETT. Washington, D. C. Three in Detroit, two in Columbus, Ohio, two in Toronto, Ontario, and five in Winnipeg.

Senator WORKS. Since that time has the number of stores under your control been increased?

Mr. LIGGETT. Decreased by four.

Senator WORKS. Where?

Mr. LIGGETT. One in Providence, one in Troy, N. Y., one in Paterson, N. J., and for the minute I can not think where the fourth place is.

\* \* \* \* \*

Senator WORKS. Next, it is stated that Louis D. Brandeis is understood to have been retained during this period for some of the parties in interest for the purpose of preparing an opinion and taking part in the negotiations with United States District Attorney Anderson and with the Department of Justice. What do you know about that?

Mr. LIGGETT. In the latter part of October, I think somewhere about the 22d or possibly the 25th of October, one of the two dates, I went to Mr. Anderson's office with my counsel, Mr. Snow, at the request of Mr. Anderson, to make a full statement regarding the merger and the policies of the United Drug Co. previous to, and what they might be following, the merger; going, as we expressed it, to lay our cards on the table.

Mr. Anderson's point of view at that time was, as I felt, very arbitrary; and as we left his office with Mr. Snow, in answer to some statement that I made regarding Mr. Anderson's position, said that he felt positive that Mr. Anderson was wrong in his view of the case, and he said, as nearly as I can recall it, that he has always represented the corporate interests in matters of this kind.

Senator BORAH. That is, Mr. Snow?

Mr. LIGGETT. Mr. Snow had always represented corporate interests in matters of this kind, and that while he did believe that Mr. Anderson was wrong it was possible that some one else who had represented interests other than corporate interests might have a different viewpoint to give Mr. Snow, and that he thought he would like to consult with some one. I asked him whom he had in mind. His answer was that there was only one man that he cared to put the question up to, and that was Mr. Brandeis, and I replied, "Why don't you get Mr. Brandeis, if that is the case?"

\* \* \* \* \*

Senator WORKS. Now, you may go on. You were telling us what occurred between you and Mr. Snow, and his determination to consult Mr. Brandeis. Had you concluded that?

Mr. LIGGETT. I had concluded that.

Senator WORKS. Was that all the connection you had with it?

Mr. LIGGETT. That was all the connection I had with it.

Senator WORKS. Did you come in contact with Mr. Brandeis after that?

Mr. LIGGETT. I have never seen Mr. Brandeis that I know of.

Senator WORKS. Did you ever see any paper in the form of an opinion or brief that was prepared by Mr. Brandeis?

Mr. LIGGETT. Yes, sir; a joint letter signed by Mr. Brandeis and Mr. Snow.

\* \* \* \* \*

Senator WORKS. Mr. Liggett, at the time this opinion was furnished by Brandeis, what was the condition of this merger or consolidation, or whatever it might be called? Were all of these chains of stores, as we may call them, under your control at that time?

Mr. LIGGETT. No, sir.

Senator WORKS. This was before the merger took place—the final merger?

Mr. LIGGETT. Before the final merger took place. The final merger took place on February 4 of this year.

Senator WORKS. This is dated, I see, December 16, 1915.

Mr. LIGGETT. Yes, sir.

Senator WORKS. And the consolidation took place in February following?

Mr. LIGGETT. The final merger; yes, sir.

\* \* \* \* \*

Senator WORKS. What was the amount of the capital stock of the merged company?

Mr. LIGGETT. Authorized or issued?

Senator WORKS. You may give us both.

Mr. LIGGETT. Fifty-two millions authorized stock and approximately thirty-five millions of issued stock.

Senator WORKS. Let me read this statement which I have here and see whether that is substantially correct:

On February 5 the meeting of the Riker & Hegeman stockholders, which had been repeatedly postponed, was finally held and the merger was ratified, and two days later the United Drug Co. (Inc.) of New York was organized under the laws of New York with a capital of \$53,100,000, which promptly took over all the Riker & Hegeman chains and all of the United Drug chains; and interests identified with the United Cigar Co. were conspicuous upon the board of the new United Drug Co.

Mr. LIGGETT. The last statement is incorrect.

Senator WORKS. The statement respecting the—

Mr. LIGGETT. The interests of the United Cigar Stores Co. were not represented then and are not represented now on the board of the United Drug Co. by anyone.

Senator WORKS. And that concern is controlled by this merger?

Mr. LIGGETT. Which concern?

Senator WORKS. The United Cigar Co.

Mr. LIGGETT. No; it is not—the United Cigar Co.

Senator WORKS. They have no connection?

Mr. LIGGETT. They have no connection with us whatever, either in stock ownership or representation or anything else.

Senator WORKS. And that company is not represented on the board of directors?

Mr. LIGGETT. No, sir.

Senator WORKS. Except for that, is that statement correct?

Mr. LIGGETT. Yes; so far as I can recollect.

\* \* \* \* \*

Senator BORAH. Do you control any articles or goods by reason of patents or copyrights, or anything of that kind?

Mr. LIGGETT. Only trade-marks.

Senator BORAH. Trade-marks.

Mr. LIGGETT. Yes; registered trade-marked goods; but we control no basic patent for manufacturing or control of production at all. We have none.

Senator BORAH. As I understand you, there are 153 retail stores controlled by this merger?

Mr. LIGGETT. Yes.

Senator BORAH. Scattered in 8 or 10 States of the Union, at least?

Mr. LIGGETT. I should think that many or more.

Senator BORAH. And your own parent company, the stockholding company, controls a sufficient amount of the stock of all the subsidiary companies to dominate those companies?

Mr. LIGGETT. Exactly. They are subsidiary companies, practically.

(Hearings pp. 7, 8, 12, 56, 59.)

Mr. Snow, mentioned by Mr. Liggett as his attorney, testified that he employed Mr. Brandeis who joined him in a letter, in the form of a brief, to the district attorney defending the legality of the proposed merger; that he joined in the brief and was regularly employed as an attorney for that purpose.

The brief will be found in the record of the hearings (Hearings p. 13).

Also the report of the district attorney to the Attorney General (Hearings p. 39).

This combination of drug stores and cigar agencies was the largest in the country. Mr. Liggett testified on that subject as follows:

Senator CHILTON. What other large retailers are there besides this of yours?

Mr. LIGGETT. The Owl Drug Co., in California, is just on the Pacific coast.

Senator CHILTON. What percentage of the business has the Owl Drug Co.?

Mr. LIGGETT. Of the total business of the United States?

Senator CHILTON. Yes.

Mr. LIGGETT. I should not think it represented 1 per cent.

Senator CHILTON. Is it as large as yours?

Mr. LIGGETT. Oh, no. It is less than one-ninth the size of ours.

Senator BORAH. Are there other companies aside from yours which represent a larger per cent than yours in the retail business?

Mr. LIGGETT. No, sir. There are no other large retail drug businesses. By large, I mean business running in excess of a million and a half of dollars. The nearest to it that I think of is the May Stores, of Pittsburgh, who are part of our 7,000 stores, however, we have their agency. Then there are the Marshall Stores, of Cleveland, the Public Drug Co., and the Bath & Raynor chain drug stores in Chicago. They all represent a substantial business running to about \$1,000,000 each or maybe a trifle more.

Senator WORKS. Do you control any stores on the Pacific coast at all?

Mr. LIGGETT. No, sir.

Senator WORKS. The field is covered by the Owl Co.?

Mr. LIGGETT. By the Owl Drug Co.

Sensors WORKS. The Owl Drug Co.

Mr. LIGGETT. We have a small interest in the Owl Drug Co., but that was put in at the time following the earthquake in San Francisco to assist them, financially, and it has been profitable, and we left a very small interest in their business.

Senator WORKS. What territory do they cover?

Mr. LIGGETT. They cover from San Diego to Spokane, all the principal cities; the large cities, not the smaller cities. They have 22 stores, located in San Diego, Los Angeles, San Francisco, Oakland, Portland, Seattle, Spokane, and one in Sacramento.

Senator WORKS. They have no stores east of the Rocky Mountains, have they?

Mr. LIGGETT. No, sir.

Senator WORKS. You have not gone into their territory?

Mr. LIGGETT. No; we have not extended our business west of the mountains.

Senator WORKS. Nor they into yours?

Mr. LIGGETT. I do not know whether they have or not. We have heard that they were making leases in New York and Chicago.

Senator WORKS. They have no stores there?

Mr. LIGGETT. They have no established stores that I know of; only rumor.

Mr. Brandeis' inconsistent position as a defender of the public interests and his practice as an attorney—in the one case denouncing such combinations as illegal and against the public interests, and in the other upholding their validity and attempting to defend and protect them from suit by the Department of Justice, is sharply and clearly presented by this transaction.

The facts upon which our conclusions are based are undisputed. They present a condition that should make the confirmation of this man by the United States Senate impossible. Never before in the history of the country has a man been appointed a Justice of the Supreme Court of the United States whose honesty and integrity were seriously brought in question. It must be evident to any thinking and unbiased mind that this appointment has resulted from something other than the qualifications and fitness of the appointee for the office.

We regard it as a great misfortune and a distinct lowering of the standard heretofore maintained in making appointments to this high office that one should be selected for the place whose reputation for honesty and integrity amongst his associates at the bar has been proved to be bad, which reputation has been justified by his own course of conduct. We cannot conscientiously give our consent to the confirmation of such an appointment.

C. D. CLARK.  
KNUTE NELSON.  
WM. P. DILLINGHAM.  
GEO. SUTHERLAND.  
FRANK B. BRANDEGEE.  
WM. E. BORAH.  
ALBERT B. CUMMINS.  
JOHN D. WORKS.



## NOMINATION OF LOUIS D. BRANDEIS.

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Mr. CUMMINS, from the subcommittee of the Committee on the Judiciary, submitted the following

### VIEWS.

[To accompany the nomination of Louis D. Brandeis.]

To the COMMITTEE ON THE JUDICIARY,  
*United States Senate:*

As a member of the subcommittee, appointed to consider the nomination of Louis D. Brandeis as a justice of the Supreme Court of the United States, I beg to submit the following report:

That Mr. Brandeis is a man of unusual intellectual power and of high legal learning is admitted by everybody. The opposition to his confirmation is not based upon any doubt respecting his general competency as a lawyer.

There have been laid before the committee many opinions, some favorable, some unfavorable, touching his fitness for the office to which he has been nominated, and with regard to his reputation at the Boston bar. It is most unfortunate that such questions should arise concerning one who has been selected by the President for a place upon the most exalted tribunal in the world, and I deplore that phase of the controversy. These adverse opinions are, in the main, founded directly or indirectly upon certain specific acts of alleged wrong-doing or impropriety which the subcommittee has examined, and we are therefore in a position to determine whether Mr. Brandeis has given reason for the distrust which has been expressed.

My conclusions rest chiefly upon the proof submitted to the committee concerning definite charges which have been made respecting the conduct and characteristics of the nominee. From this standpoint it is my purpose, as briefly as may be, to state the effect of the testimony adduced and the impressions it has made upon my mind.

CHARGE RELATING TO THE CONDUCT OF MR. BRANDEIS IN THE PROCEEDING KNOWN AS THE "FIVE PER CENT ADVANCE RATE CASE" OF 1913-1915, TRIED BEFORE THE INTERSTATE COMMERCE COMMISSION.

It is alleged against Mr. Brandeis that, in this case, he was guilty of unfair, unprofessional conduct, and betrayed the interests of the public.

In commenting upon this charge, as well as upon all others, I desire it to be understood that I will confine myself to the undisputed

facts, for my conclusions are not dependent upon the comparative weight of the testimony with regard to any controverted issue. This course will relieve me from extensive quotations from the evidence and in part from references to the pages of the record.

In 1910 the railroads operating in what is known as official classification territory, acting in concert, filed with the Interstate Commerce Commission, schedules showing a general increase in rates. Under the act of Congress of 1910 these rates were suspended and a hearing ensued which resulted in a denial of the proposed increases. In this proceeding Mr. Brandeis appeared as an attorney for a Massachusetts commercial organization in opposition to the increases sought, basing his opposition mainly upon the proposition that if the railroads were efficiently managed they could enlarge their net revenues without advancing their rates. He did not, however, concede or suggest that the net revenues, taken as a whole, were inadequate.

In 1913 the same railroads again filed with the commission schedules of rates advancing them generally but not horizontally, and again the commission suspended the schedules and went forward to another hearing.

The proposed increases were so great that shippers everywhere were alarmed. The State railroad commissions became interested, and these State commissions, together with the business organizations, appeared in Washington for the purpose of preventing, if possible, the advance. In this situation there occurred an incident which had never happened before and which, it is profoundly hoped, will never occur again. The Interstate Commerce Commission, acting through one of its members, employed Mr. Brandeis, and inasmuch as the terms of the employment will become important I quote the material part of the letter. It was dated August 15, 1913 (record, p. 8):

We are, of course, aware of the fact that the railroads will not fail fully to present their side of the case, and the commission has felt that every effort should be made, *in the public interest, adequately to present the other side.* Would you care to undertake that burden? As you are already aware, in a number of cases of large importance and wide interest, special counsel have been retained by the commission. As a matter of fact, that has not been their real relation in these controversies. They have been retained by the commission, not as advocates or to support any special theory of the issues involved, *but as a means by which the commission might be advised of all the facts and not have to decide the issue upon a record made up largely in one interest.* It is with this general thought in mind that the commission has reached the conclusion that in the rate advance case special counsel should be retained and I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record, *without advocating any particular theory for its disposition.* In making this last observation you will, of course, understand that you will be expected to emphasize any aspect of the case which in your judgment after an examination of the whole situation, may require emphasis. *The commission, however, wishes to avoid a record based solely on a particular view or theory.*

With reference to that part of the letter which states that the commission had theretofore retained special counsel it may be said that the lawyers so employed considered their employment to cover only the development of the facts and no one of them, I believe, ever assumed that it was his function to become for the time being a member of the commission and decide the case, or make an argument for the carriers. (Record, pp. 87, 91, 92.)

It was claimed before the subcommittee that this letter made Mr. Brandeis substantially a member of the commission, and that it was



his duty upon the hearing of the case not to make an argument but to render an opinion. If this is the true interpretation of the letter, the employment was not only without authority on the part of the commission but was most discreditable, and no reputable lawyer would have entered into such an undertaking or agreed to sustain such a relation to the commission. I desire, however, to do the commission the justice of saying that while the terms of the communication may be unfortunate, the real meaning can not be misunderstood by a fair-minded man.

Mr. Brandeis was employed to take the public side of the question, that is to say, he was to present the side opposed to the claims of the railroads. It was especially said to him that the railroads would be fully prepared to present their side of the case. What the commission wanted Mr. Brandeis to do was to develop all the facts, whether favorable or unfavorable to any theory, and his appointment was thought to be necessary because the commission has under the law opportunities to secure facts which are not accessible to a lawyer representing either State commissions or shippers. It was enjoined upon him that he was not to advocate any particular theory. Under such direction to Mr. Brandeis he entered upon his duties and the next inquiry is, How did he perform them?

The hearing was both prolonged and exhaustive. Attorneys from all parts of the country representing shippers appeared with their evidence tending to show that the rates upon the particular commodities, in which their clients were interested, ought not to be advanced. Several State commissions concerned not in any particular commodities but in the public welfare alone, took up the fight for the public and finally authorized Mr. Clifford Thorne, chairman of the Iowa Railroad Commission, to appear for them. His sole contention, on behalf of the State commissions, was that the net revenue of the railroads in official classification territory, taken as a whole were adequate; and to sustain it he introduced a very large volume of evidence.

If his position had been sustained there would have been an end of the case, as in that event the Interstate Commerce Commission would have been compelled to have investigated the affairs of the individual railroads in order to ascertain whether, with respect to any one of them, the proposed increases were reasonable. In taking oral testimony before the commission Mr. Brandeis took his place upon the public side of the table and was in regular conference with the attorneys who represented the State commissions and the shippers. With others, he cross-examined the witnesses who were produced by the railroad companies. He extended to Mr. Thorne the most hearty congratulations upon the showing made intended to prove the adequacy of present revenues. Finally, the testimony being concluded, the time came for an arrangement concerning arguments, both printed and oral, and this is what happened before the commission on that occasion, April 7, 1914. (Record pp. 12, 13.)

The chairman of the commission after some preliminary statements said:

There are, therefore, two proceedings which, however, the commission has consolidated upon the record. Growing out of the two proceedings were certain hearings respecting rates on certain commodities, and protests having been made by shippers

interested in those particular rates, those hearings were conducted independently, but they are also a part of this proceeding now before us.

The rest of the case has followed the two branches of inquiry propounded by the commission in its first order of investigation, namely:

Do the present rates of transportation yield an adequate return to common carriers, the railroads operating in official classification territory?

Second. If not, what general course may the carriers pursue to meet that situation?

Our investigations under this first question are to be considered as having come to a close to-day, subject to the statement just made about exhibits called for and other matters. With respect to that matter the commission desires an argument and briefs at an early date. The first available date is on the 20th of this month, and it has been the desire and hope of the commission that counsel on all sides might have their briefs in and be ready on that date to commence the oral arguments *under the first question*. I should like to inquire whether that will meet the convenience of counsel?

Counsel for the railroads made reply that it is immaterial to quote. Following him Mr. Brandeis addressed the commission as follows (record, p. 13):

MR. BRANDEIS. I have conferred with various counsel, and they suggest that the 27th will be a date that will be more agreeable to them than the 20th, as they will have to prepare the briefs as well as go through the record for the purpose.

It was accordingly arranged that briefs were to be filed on April 27, and that the oral argument *upon the first question* propounded by the commission should begin immediately thereafter. The time for oral argument was divided equally between the public and the railroads, and again Mr. Brandeis ranged himself on the public side, and his time was to be a part of the time allotted to the public. When the time arrived for argument, and after conference between Mr. Brandeis, Mr. Thorne, and other counsel, it was determined that attorneys representing particular shippers should speak first, then Mr. Thorne, and that Mr. Brandeis should close the case for the public. At this point it is important to understand just what occurred between Mr. Thorne and Mr. Brandeis at or about the time the argument began. I quote from Mr. Thorne's testimony (record, p. 17):

I returned for the oral argument, met Mr. Brandeis in the offices of the commission. He was very cordial in his greeting. He called me into his room (where he worked occasionally, perhaps the bulk of his time, while he was over at the commission's offices) and he said: "Mr. Thorne"—I am quoting him in substance; I can not remember his exact words, but this was the purport of his statement—"you and I have mastered, or tried to master, this case as a whole. The other representatives are chiefly interested in their specific commodities. I have talked it over with the commission," or "with Commissioner Harlan"—he said one or the other—"and it is the desire of the commission that you open the argument, and I will close on behalf of the public. In between will come the arguments of the representatives of special interests, whoever they may be. The railroads will open the case, they having the burden, and will close the case." I said, "Mr. Brandeis, it will be impossible for me to open this argument on behalf of the public at this time. I am physically unable to do so. I have been working day and night on the brief."

Mr. Thorne further says (record, p. 17):

I was fearful that the men interested in a special commodity, with all the pressure that was being brought to bear upon the shippers everywhere, would be tempted to concede the main issue that was up for discussion at this time and say, "But this should not apply to my commodity for the following reasons," etc.

A little later and before the argument began there was further communication between Mr. Thorne and Mr. Brandeis, which I quote (record, p. 19):

And I wrote a note to him stating as I understood he was giving special attention to the question of leeches, inadequate revenues on particular commodities, as he had stated to me, and that when he came to the shippers, they were giving their chief

attention to the adequacy of revenues on their particular commodities, I was afraid I was going to be playing a lone hand on the issue that was specifically set down for argument at that time, and asked him if he could arrange for my following the shippers and preceding him. He misinterpreted the purport of my request. He thought I was desirous of displacing him in closing the argument.

Senator WALSH. Have you that correspondence, Mr. Thorne?

Mr. THORNE. No; it was just a note written in lead pencil on a sheet of paper at the time. And he said, "You can make your opening statement and then make an additional argument after the shippers have concluded." I said, "No; I do not desire to make more than one argument." And Mr. Brandeis, as I previously stated, misunderstood the purport of my request, evidently, because he then said, "Well, I will leave to the commission whether you or I shall close for the public." And I said, "No; Mr. Brandeis, I do not desire to displace you in any sense of the word. I am not afraid of you a particle; but it is the person interested in the particular commodities who I fear will be tempted to make an unfortunate concession." "All right, then," he said, "that will be satisfactory. I think there will be no trouble about arranging that."

There is but one conflict in the evidence with regard to the entire subject, and it relates to the knowledge which Mr. Thorne had of the position which Mr. Brandeis was about to take. Mr. Thorne says—and it is not contradicted in any way—that Mr. Brandeis gave him no intimation of the extraordinary thing he was about to do. I quote again from Mr. Thorne's testimony (record, p. 19):

Later in the day, or the following day—I can not state exactly—I received a copy of his (Brandeis's) brief. I looked through it to see the main positions he had taken. I did not find any statement there that the revenues, as a whole, were adequate or any discussion of such a proposition. I then became anxious to know the situation. Mr. Brandeis, I remember, was leaning forward or listening or talking to some other party—I do not know which. Mr. Carmalt was right between us. Mr. Carmalt was the assistant to Commissioner Harlan, chairman of the commission at that time, and was also assisting Mr. Brandeis. He is now chief examiner, I believe, of the Interstate Commerce Commission. I said to Mr. Carmalt, "What position is Mr. Brandeis going to take in this case?" He said, "You will have to ask Mr. Brandeis. I think that probably he is going to hold that some of the rates are inadequate on special articles and that there should be a general revision in the Central Freight Association territory."

Of course, that did not concern me vitally, and that served to allay my alarm, but to make sure, I asked Mr. Brandeis his position. He said, "Well, now, Mr. Thorne, I believe that some of the railroads are not earning enough money, and I think that the situation is bad in Central Freight Association territory." I said, "Well, Mr. Brandeis, that is all right; I have no objection so far as that is concerned," and I was entirely satisfied. In the brief he had taken the position, "If the revenues are inadequate, how could they secure the additional money?" But he had taken substantially the same position in the 1910 case—"If the revenues are inadequate, they should secure additional money through the adoption of scientific-management methods."

Mr. Carmalt says (record, p. 83) that a day or two before the oral arguments Mr. Brandeis said, in discussing the question with him (Carmalt), that he intended to take substantially the position which he afterwards did take, and that some time during the argument Mr. Thorne asked him (Carmalt) what position Mr. Brandeis was going to take on the sufficiency of the revenues, and that he (Carmalt) told him (Thorne) what Mr. Brandeis had previously stated.

This is absolutely the only dispute, in fact, and I am quite willing to accept either statement. To me Mr. Carmalt's recollection of the matter reflects much more severely upon Mr. Brandeis than does Mr. Thorne's statement.

Taking up the thread of the story again, I find this situation: After months of testimony the commission, with the concurrence of all who were interested in the subject, propounded, for argument to

begin on April 27, one question, namely, "Do the present rates of transportation yield an adequate return to common carriers, the railroads, in official classification territory?" The other branch of the inquiry, namely, "If not, what general course may the carriers pursue to meet that situation?" was reserved for a later hearing.

Counsel representing commercial organizations, shippers, State railroad commissions, and Mr. Brandeis were on one side of the table, presumably to argue in the affirmative. And thus the trial proceeded. The carriers opened the argument. Then came the counsel for the commercial organizations and shippers, then Mr. Thorne, who presented the case he had made on behalf of the State commissions, attempting to show from the evidence which had been adduced that the net revenues of the railroads in official classification territory, taken as a whole, were adequate—sufficient. Then followed Mr. Brandeis. His opening sentences were (record, pp. 20–21):

May it please your honors, it may be helpful if at the outset I state the conclusions to which a review of the record in these cases has brought me. They are these:

First, that on the whole the net income, the net operating revenues of the carriers in official classification territory, are smaller than is consistent with their assured prosperity and the welfare of the community, and that this is notably true of the Central Freight Association lines, and it is true practically as to other lines also because of the Central Freight Association scale.

Later in his discussion he (Brandeis) declared (record, p. 21):

I have said, and I will say again, that, whatever may be true of the rates, the net operating revenues and the net income of these properties are not such as to give assured prosperity to the railroads such as the welfare of the community demands.

It is not strange that when Mr. Thorne, representing the public through the State commission, heard these admissions he was dumbfounded and felt that the labor of months had gone for naught, and that Mr. Brandeis had made an admission which destroyed any hope of defeating the claims of the carriers. Sitting as a judge rather than as an advocate he thus practically decided the suit in favor of the railroads. It must not be understood that Mr. Brandeis admitted that the rates ought to be advanced according to the schedules filed by the railroads. After having made the fatal admission to which I have referred he proceeded to insist that there were other ways of swelling revenues, such as increasing the passenger rates, charging for services rendered without compensation, and the like, but this did not retrieve the disaster. The commission accepted the admission made by Mr. Brandeis. It followed his suggestions with respect to the new method of obtaining additional revenues for the purposes of the case then pending; but shortly thereafter, upon a rehearing, advanced the rates substantially as prayed by the common carriers, and the people are now paying them.

It is not my purpose to enter upon the merits of the issues tried before the commission and I shall express no opinion of the decision under which the carriers are now operating. I have only to do with the quality of the act of Mr. Brandeis. To me it seems utterly indefensible. He was an attorney for the public. Mr. Thorne was an attorney for the public. The only issue between the public and the railroads up for argument at that time was whether the railroads were getting enough money from the public to compensate them for the service rendered to the public. Mr. Thorne had made this the vital point in the most remarkable array of evidence I have ever

examined. It had been strengthened by cross-examinations conducted by both Mr. Thorne and Mr. Brandeis. No matter how they were appointed, Brandeis and Thorne were associate counsel for the public on this issue. The railroads had argued earnestly and ingeniously for their side. Thorne, in a wonderful discussion, had argued for the public side, insisting that the public was paying enough already. Then Mr. Brandeis, who had asserted his right to close the argument for the public, rose and the very first thing he said was that the railroad contention, on the issue then being tried, ought to be sustained. I have heard it said that if Mr. Brandeis honestly believed the railroads were right on this question it was his duty to say so. Any such view is a total misconception of the situation. If he could not honestly argue for the public he ought not to have argued the question at all. He should have left Mr. Thorne to maintain the public rights as best he could. Because he reached the conclusion that the railroads were right, on the issue, is no justification whatever for making an argument for them under the circumstances of the trial.

If he appeared in the case as a judge he should have heard all the testimony and arguments and rendered his opinion in the usual way. If he appeared to see that all the facts that were pertinent to the issues were developed he ought to have left the argument to those who were advocating their respective claims. If his employment was to advise the commission upon the conclusions or questions of law his place was in the conference room and not at the bar.

I have endeavored in vain to conceive any excuse for the course Mr. Brandeis pursued. Its consequences are emphasized when it is remembered that the testimony introduced by Mr. Thorne had established beyond controversy that the net revenue of the carriers had, during the preceding year, been sufficient to meet all the expenses of maintenance and operation, all fixed charges, including taxes, all interest on the bonded indebtedness, and that there remained enough to pay *eight and seven-tenths per cent* on all their outstanding capital stock. (Record, p. 32.)

The commission had decided in 1910 that 7½ per cent net on common stock outstanding was adequate—that is to say, that such a return was sufficient to pay a reasonable dividend upon the stock and create a reasonable surplus. This was the very pith of the claim made by Mr. Thorne, and yet during the argument of Mr. Brandeis before the commission the following colloquy occurred (Record, p. 32):

MR. BRANDEIS. While I would much rather it were possible to remove a fact, this fact that Mr. Thorne suggests as being such a peril to the community, I myself rather look with hope to the ultimate working out of this problem by the Supreme Court of the United States, with the aid of the commission and other courts, instead of denying to the railroads to-day that which, in good business judgment, in looking to the immediate future with which we have to deal, is an essential to the health of the railroads.

MR. THORNE. Mr. Brandeis, did you understand me to deny any surplus?

MR. BRANDEIS. I thought you were rather niggardly as to surplus.

MR. THORNE. I allowed the same surplus that the commission did in 1910, and if your remark applies to my allowance it applies to the other.

If, under the circumstances of this proceeding, the most important from every point of view which has taken place in a quarter of a century, a lawyer who appears with other counsel in behalf of the public can, after his associates have made their arguments, arise

and in open court admit that the carriers were wholly right and the public wholly wrong, upon the immediate question under consideration, without incurring the condemnation which follows betrayal, then I confess that I do not understand either common morality among men or the ethics of the profession to which Mr. Brandeis belongs.

#### THE UNITED SHOE MACHINERY CO. MATTER.

The facts relating to the charge which grows out of the connection of Mr. Brandeis with the United Shoe Machinery Co. are so fully stated in the separate views of my colleagues, Senators Chilton and Works, that it is unnecessary for me to do more than, first, to state the charge; second, my conclusions respecting the facts; and, third, my opinion of the conduct of Mr. Brandeis.

The charge is that Mr. Brandeis, having been for years a director and counsel for the United Shoe Machinery Co., having approved the terms of its contracts and leases with its customers, and having defended them before a committee of the Massachusetts Legislature, after his relation as director and counsel had ceased, made war upon his former client, not only before committees of Congress, as a citizen, but as an attorney in behalf of certain shoe manufacturers; furthermore, that in his public campaign he did not adhere to the truth, and that in appearing for the manufacturers he attacked the very system he had helped build up.

That Mr. Brandeis was for some years a director and attorney for the United Shoe Machinery Co., frequently advised with respect to the leases and contracts which were afterwards assailed; that he did defend the system before a committee of the Massachusetts Legislature; that some three or four years after he had resigned as director and withdrawn as attorney for the Machinery Co., he did assail his former client in a public way and before committees of Congress as a vicious monopoly in restraint of commerce; that he did accept employment from an alliance of shoe manufacturers for the purpose of overturning the system, is not disputed.

I do not attempt to determine whether the statements made in the public assaults and in the campaign for the manufacturers were truthful or untruthful. It was manifestly impossible for the committee to try that question. Nor do I take into account the fact that in the litigation Mr. Brandeis personally returned to his clients the \$2,500 collected by his firm as compensation. This fact seems to me to be immaterial, for if the attorney was not working for pay his clients were looking for pecuniary profit, and Mr. Brandeis had no more right to appear for them without compensation than with compensation. My opinion is that a due regard for professional propriety would have prevented Mr. Brandeis from accepting employment from anyone to attack his former client with respect to the very matters about which he had advised and defended it.

I do not apply the same rule to his efforts, as a citizen, to promote the legislation which he believed to be essential to the public welfare, for every man owes that duty to society; but I am not able to reconcile Brandeis, the attorney for the United Shoe Machinery Co., with Brandeis, the attorney for the Shoe Manufacturers' Alliance.

## THE LENNOX MATTER.

In this matter the general charge against Mr. Brandeis is that in quick succession he accepted employment from three clients whose interests were necessarily in conflict and undertook the impossible task of advising all of them at the same time. The defense is that he became the attorney for a "situation" and that he could without offense represent all the interests, inasmuch as he was trying to do the square thing.

In many respects the history of Mr. Brandeis's connection with these several clients is the most remarkable I have ever heard. It was developed in a large volume of testimony, which is well worth reading, but for the purposes of the present report it may be condensed within narrow limits.

P. Lennox & Co., a copartnership composed of Patrick Lennox and his son, James T. Lennox, carrying on a large tanning business in Lynn, Salem, and Peabody, Mass., became financially embarrassed. The Abe Stein Co., of New York, was a creditor to the extent of more than \$200,000, and was represented by a New York lawyer named Stroock. The younger Lennox, who was acting for the firm, informed the Abe Stein Co. of the trouble early in September, 1907, and asked help of some kind. Thereupon Mr. Stein and his lawyer, Mr. Stroock, started to Boston, and on the way over decided that they would employ Mr. Brandeis on behalf of the Abe Stein Co. Immediately upon reaching Boston they visited Mr. Brandeis and did employ him. They then saw Mr. Lennox, and after some discussion advised P. Lennox & Co. to retain Mr. Brandeis. Mr. Stroock offered to see Brandeis to ascertain whether he would accept the employment, which he did during the same forenoon. Mr. Brandeis assented, whereupon Stein, Stroock, and two friends of Lennox went to the offices of Brandeis, Dunbar & Nutter to go over the affairs of P. Lennox & Co. Brandeis, Dunbar & Nutter already represented Weil, Farrell & Co., a creditor to the extent of something like \$300,000. Such was the situation when Brandeis, Stroock, Stein, and Lennox, and the two other gentlemen whose names are not material, came together in Mr. Brandeis's office for a conference. A stenographer was called in, and what was said upon that occasion was taken down and a transcript of the stenographic notes is before the committee. An exhaustive inquiry into the affairs of the Lennox firm was made by Mr. Brandeis, unquestionably under his employment by Mr. Lennox. This is evident because the only purpose that Mr. Lennox had in going to Brandeis was to be advised with respect to the proper course to pursue. He wanted somebody to tell him what to do; and to that end laid before Mr. Brandeis a rather minute account of the assets and liabilities of the copartnership. The result of the conference was that Mr. Brandeis advised Mr. Lennox to make an assignment for the benefit of the creditors, and suggested that his partner Mr. Nutter should become the assignee. The assignment was immediately prepared, and after a little delay was executed and filed. Mr. Nutter took possession of the property, and the firm of Brandeis, Dunbar & Nutter became his attorneys. Within a short time a disagreement arose between Lennox and the assignee, whereupon Brandeis, Dunbar & Nutter, as attorneys for certain creditors, filed a petition in bankruptcy against P. Lennox & Co., alleging the assignment for the benefit of creditors

which Brandeis had advised and procured as an act of bankruptcy. Other petitions in bankruptcy were filed, alleging other causes, and finally the copartnership of P. Lennox & Co. and its individual members were adjudged bankrupts, and Mr. Nutter became one of the trustees, and his firm the attorneys for the trustees.

Four years later the bankruptcy proceedings ended in a compromise through which the firm creditors received 40 per cent and the individual creditors 100 per cent. The report submitted by Senator Chilton gives copious references to the testimony, and the report presented by Senator Works contains extracts from the record so clearly arranged and so abundant that if I were to attempt the same work it would be a mere duplication. There is no real conflict in the record, although there are some serious differences respecting the conclusions which are to be drawn from the conversations of the various parties to this strange proceeding.

There is absolutely no doubt that Mr. Brandeis was at the very beginning the attorney for Weil, Farrell & Co., Abe Stein Co., and P. Lennox & Co. There is no question that under these circumstances he advised an assignment for the benefit of creditors. It is not controverted that he made the assignment the basis of bankruptcy proceedings, and thus became hostile to his former client. The explanation which his friends present is that what Mr. Brandeis really agreed to do was to take the estate and see that it was distributed lawfully among the creditors. To me it is an unseemly spectacle, and Mr. Brandeis is not the only actor in the scene who deserves censure. When I think of how Lennox, with Stein and Stroock on either side of him, went to Brandeis, the attorney for Weil, Farrell & Co., and the Abe Stein Co., to be advised and guided in the way that would lead to emancipation from the troubles that were harassing them, I can not understand how reputable men could tolerate even that arrangement; but when I see Mr. Brandeis accepting the relation, acquiring all the information that Lennox had to give, advising an assignment, practically to himself, and then see him turn on Lennox and charge the very thing that he had counseled and procured as an act of bankruptcy, I am bound to condemn the whole transaction, no matter how distinguished the offenders may be.

#### THE GLAVIS-BALLINGER INVESTIGATION.

The material facts in this case are not in dispute, and they can be very briefly stated.

Glavis was an employee of the Interior Department. He made a series of grave charges affecting the conduct of the department and the integrity of Mr. Ballinger, the Secretary of the Interior. These charges related to the disposition of the public domain and involved what is generally known as the conservation policy of the United States. They were published in Collier's Weekly, a magazine of wide circulation and great influence. Out of these charges grew an investigation carried on by a joint committee of the two Houses of Congress. The investigation finally took the form of a proceeding which may be described as *Glavis v. Ballinger*. The inquiry broadened until there was brought within its scope the attitude of many public officials, including the President and the Attorney General. Glavis was not



only without means, but was somewhat obscure and in and of himself could not have given to the proceedings any considerable force. Collier's Weekly, knowing that it had published statements which, if not true, would subject it to damages in a libel suit, and having a real desire, I have no doubt, to further the public interest and expose what it believed to be corruption in the Interior Department, employed Mr. Brandeis to appear before the committee and sustain the charges. The view of the magazine with respect to its relation to the controversy is clearly and forcibly stated by Mr. Norman Hapgood, who was then its editor:

Senator WORKS. In the discussion of the matter, was the question raised at any time as to the probable liability of Collier's for the publication it had made?

Mr. HAPGOOD. It certainly was. There was an enormous liability of every kind—moral and financial. When we undertook to show that the Government was concealing such important facts, we were undertaking a good deal, but we did it with a very large sense of responsibility of every kind.

Senator WORKS. You understood perfectly that Collier's had a personal interest in the matter, in view of the fact that it might be held responsible in an action for libel for publishing a document of that kind?

Mr. HAPGOOD. We certainly did understand that. (Record, p. 459.)

Mr. Mark Sullivan, now the editor of Collier's, then the associate editor, put it in this way:

Senator WORKS. Then you understood, Mr. Sullivan, that Mr. Brandeis was employed by Collier's Weekly to represent its interests and protect it?

Mr. SULLIVAN. Certainly. If, when the investigation began, Glavis had been discredited, if the investigation had shown nothing serious, Collier's Weekly was in a position to be very much discredited.

Senator WORKS. Will you be good enough to answer the question?

Mr. SULLIVAN. Yes; surely. I meant to.

Senator WORKS. Read the question, Mr. Reporter.

The reporter (reading):

"Then, you understood, Mr. Sullivan, that Mr. Brandeis was employed by Collier's Weekly to represent its interests and protect it?"

Mr. SULLIVAN. Largely, I should say, though I ought to remind you again that the editor of the paper then was Mr. Hapgood. I was not even present.

Senator WORKS. I was only asking for your understanding of it. That was your understanding?

Mr. SULLIVAN. Largely to protect the paper's interests, and largely for public service. (Record, p. 327.)

It is manifest that Collier's Weekly had as much right to appear before the committee as Glavis had, for they sustained exactly the same relation to the investigation; and as a matter of fact, Mr. Robert Collier was invited to so appear.

After Mr. Brandeis had been thus employed by Collier's Weekly the question came up, and naturally, for whom he should appear before the committee, and it is apparent that it was the subject of serious discussion. Mr. Hapgood says (record, p. 458):

It seemed perfectly clear to us that if this was going to be kept a conservation movement against such big forces we must not try to get into the foreground; that Mr. Glavis, who was a Government official, as well as our contributor, should be the one person kept in the front in order not to cloud the issue.

Mr. C. E. Kelley was at that time counsel for Collier's Weekly in New York City and attended to its legal business there. He had conferences with Mr. Brandeis concerning the investigation and the substance of his evidence on that point is as follows (record, pp. 389, 392, 397, 398):

Mr. Fox. Were you thereafter in Washington with Mr. Brandeis, while he was acting in the matter of the Ballinger-Pinchot-Glavis investigation?

Mr. KELLEY. Yes, sir; I was.

Mr. Fox. Did you have any conversation with him on the subject of your appearance with him in the matter before the committee?

Mr. KELLEY. I did.

Mr. Fox. Will you please state what Mr. Brandeis said in that regard, what you said to him and what he said to you, giving, of course, the substance?

Mr. KELLEY. I would not undertake to state more than the general substance, because the conversations extended over many days. The substance of the conversation on Mr. Brandeis's part was that he did not care to have me appear with him before the committee, and he also stated in those conversations the reasons for that request.

Mr. Fox. Will you give the reasons, please, and what he said?

Mr. KELLEY. He stated in substance that he was going to appear or was appearing—because our conversations extended over some time—before the committee as attorney for Mr. Glavis. (Record, p. 389.)

Again:

Senator CUMMINS. In your discussions with Mr. Brandeis with respect to appearance, was it understood that the relation of Mr. Brandeis to Collier's Weekly could not be made known?

Mr. KELLEY. Really, sir; I doubt my ability to testify as to what was understood. I might venture what the understanding was between Mr. Brandeis and myself, but I would not care to go further than that.

Senator CUMMINS. That is precisely what I asked you.

Mr. KELLEY. As between Mr. Brandeis any myself, I think I would have to say that was the understanding.

Senator CUMMINS. What reason did Mr. Brandeis give, if any, for desiring that course to be pursued?

Mr. KELLEY. That was a subject of conversation between Mr. Brandeis and myself on many occasions with a view to deciding what was the best policy, in so far as the prosecution of the charges, if I may put it that way, was concerned. I do not think I could state at this date that there was any further reason than one of policy. (Record, p. 392).

Again:

Senator WORKS. The question was considered between you and Mr. Brandeis as to whether Mr. Collier should take advantage of the invitation that had been extended to him to appear in his own name before the committee, or whether Mr. Brandeis should appear in the name of Mr. Glavis; and that was really the matter of discussion between you, was it not?

Mr. KELLEY. I think so; yes.

Senator WORKS. Did Mr. Brandeis give any reason why he thought Mr. Collier should not take that course?

Mr. KELLEY. He gave a reason, later on, as to why he thought Mr. Collier should not appear before the committee personally, namely, that he did not think that Mr. Collier could add anything to what had already been brought out.

Senator WORKS. I am not asking you about that. I am talking about the question in the first instance as to for whom Mr. Brandeis should appear. Was that matter discussed between you then, as to the propriety or policy of his appearing openly for Mr. Collier, or whether he should appear for Mr. Glavis, who was already openly a party to the proceeding?

Mr. KELLEY. It was not a subject of any extended discussion, because I accepted Mr. Brandeis's conviction on the matter.

Senator WORKS. In that immediate connection did Mr. Brandeis give you any reason why he thought Mr. Collier should not appear through him, and why he should appear for Mr. Glavis?

Mr. KELLEY. I at the present time do not recollect any reasons except his statement, in substance, that he thought it was better that he should appear for Mr. Glavis, or his statement that he was going to appear for Mr. Glavis. (Record, pp. 397-398.)

These extracts from the testimony show beyond any question that the whole subject was considered, and that after the most careful reflection it was decided that Mr. Brandeis, who had been employed by Collier's Weekly, not by Glavis, should appear for Glavis, not for Collier's Weekly, because it was better that Glavis, a subordinate in the department, should

Weekly, a strong, public-spirited magazine. The decision was carried into effect when Mr. Brandeis appeared before the committee, and I quote the record of the appearance (record, p. 1072):

Mr. GLAVIS. Mr. Chairman, I was here yesterday ready to proceed. I have brought my attorneys here, and I think that if they will be allowed to examine me that the testimony would proceed more rapidly.

The CHAIRMAN. Are you ready to proceed to testify?

Mr. GLAVIS. Yes, sir.

The CHAIRMAN. Very well. If the committee has no objection to that course, we will have your testimony taken, and your attorney can examine you in chief.

Mr. McCALL. I understand that Mr. Louis D. Brandeis is your counsel?

Mr. BRANDEIS. I am counsel for Mr. Glavis, with Mr. J. P. Cotton, jr., of New York.

The CHAIRMAN. Have you any statement that you desire to make before we proceed?

With the several parties occupying the relation toward each other shown in these quotations from the evidence, the hearing before the committee went forward, and for the service rendered by Mr. Brandeis he received from Collier's Weekly a fee of something like \$25,000 and his expenses.

Upon these undisputed facts I am called upon, as a member of the subcommittee, to say whether Mr. Brandeis was guilty of impropriety. The suggestion of those who appeared before the committee in opposition to the confirmation is that when Mr. Brandeis appeared before the committee it was his professional duty to state that he had been employed by and appeared for Collier's Weekly and that Mr. Glavis was nothing more than a nominal client, if, indeed, he was a client in any sense. The reply of those who appeared before the committee favoring the confirmation is that there was no attempt to conceal the fact that Mr. Brandeis represented Collier's Weekly and that it was generally known by those who were interested in the investigation.

I have no doubt that both Mr. Hapgood and Mr. Sullivan told many persons that the magazine had employed Mr. Brandeis, nor have I any doubt that the circumstances themselves led many other persons to believe that the magazine was really conducting the investigation. On the other hand, I am just as clear that the people of the country outside of Washington believed that Mr. Brandeis had undertaken to serve Mr. Glavis, who had no means to employ counsel, because he was interested in the public questions involved in the proceeding and that he was bringing his great abilities into the controversy in order to promote the general welfare.

I have no criticism for Collier's Weekly, for I am thoroughly convinced that its chief purpose was to expose what it sincerely believed to be gross malfeasance in office, and to protect the national resources against the unlawful designs of selfish men.

Mr. Brandeis, however, occupied a wholly different relation to the proceeding. I can not avoid the conclusion that it was his duty to state openly and frankly to the committee the fact that he had been employed by Collier's Weekly, not only to guard against the consequences of a suit for libel, but to carry on the campaign against the alleged wrongdoers in the Interior Department. Not only professional propriety in its technical sense, but the situation in a peculiar sense demanded the utmost candor. Mr. Brandeis failed to recognize his plain obligation; and the skill which he exhibited during the long and important proceeding in which the rights of the public were so vitally involved can not relieve him from just criticism.

## THE WARREN ESTATE.

It required hundreds of pages of testimony for the development of this matter. Substantially all of it is immaterial, except for the purpose of informing us of the relation which existed between the several parties. I shall not even refer to the pages of the record for the comparatively few facts out of which the present charge against Mr. Brandeis arises will not be disputed by anybody.

Prior to May, 1888, S. D. Warren, sr., was a paper manufacturer in partnership with M. B. Mason, the latter having a very small interest in the property. Warren died on May 2, 1888, leaving an estate of more than two millions of dollars. He left a will devising the estate to his widow and five children. To the former he gave five-fifteenths, to the latter two-fifteenths each. The property connected with the paper mills, which constituted the larger part of the estate, was, through a series of complicated instruments, finally vested in trustees, of whom Samuel D. Warren, jr., was one. The trustees held the property for the benefit of the heirs in the proportions already mentioned, and they acquired it with the understanding that they were to lease it to a copartnership composed of S. D. Warren, jr., and M. B. Mason, who, as lessees, were to continue the business. The trustees represented the widow and the widow and five children; namely, Susan C. Warren, the widow; S. D. Warren, jr.; Henry C. Warren; Cornelia Warren; Edward P. Warren; and Fiske Warren. M. B. Mason was also one of the trustees, so that the lease was in effect an agreement between S. D. Warren, jr., and M. B. Mason as trustee with themselves as lessees. I do not find it necessary to refer to the peculiar terms of the lease or to the controversies to which the conduct of the lessees finally gave rise. It is sufficient to say that the lease was enormously profitable for the lessees, and it may be doubted whether Edward P. Warren, one of the *cestui que trustent*, fully understood its provisions when he entered into the arrangement, for he was then living in England and continued to live there for many years.

S. D. Warren, jr., had been a law partner of Mr. Brandeis under the firm name of Warren & Brandeis, but upon the making of the lease ceased to practice law and devoted himself to the operation of the paper mills. This situation continued until about 1904, when Edward P. Warren complained of the action of the trustees and the way in which the lessees were keeping the books of the paper business, and employed counsel in Boston to look into the matter. Investigations and conferences followed without result, and on December 19, 1909, he filed a bill against the lessees for an accounting, challenging many things that had been done from the time of the making of the lease to the time of filing the bill. During the progress of the suit S. D. Warren, jr., died, and shortly thereafter there was a compromise, the details of which I think are irrelevant.

During the whole complicated transaction from the death of S. D. Warren, sr., to the time that Edward P. Warren employed independent counsel, about 1903 or 1904, Mr. Brandeis represented everybody connected with the matter; that is to say, the heirs, the trustees, and the lessees; and when the actual controversy arose between Edward P. Warren and the lessees, S. D. Warren, jr., and M. B. Mason, he continued to represent the lessees, and when the bill was

filed for an accounting in 1909, his firm appeared as counsel for the defendants and so continued until the compromise was effected.

While there has been some suggestion that it was improper for Mr. Brandeis to represent the heirs, trustees, and lessees in the original arrangement, because there were or might be conflicting interests, I do not think the criticism is well founded. The members of the family sustained to each other the most cordial, friendly relations, and it is quite evident that the widow and the four children had the most implicit confidence in the oldest son, S. D. Warren, jr., who was a man of established integrity and great ability. I dismiss that part of the charge.

The thing which Mr. Brandeis did which, in my opinion, he ought not to have done, occurred when Edward P. Warren, as a cestui que trust, questioned the conduct of the trustees and the lessees. It was at that time the conflicting interests were made clear. Before that time Mr. Brandeis had represented Mr. Edward P. Warren just as he had represented all the cestui que trustent, and when the claim was made against the lessees it seems to me that Mr. Brandeis was not at liberty to defend the lessees against it. The lessees should have sought other counsel, and Mr. Brandeis should have occupied an impartial position between the litigants. I am satisfied that there was no corrupt motive on the part of Mr. Brandeis, but inasmuch as the question is squarely before the committee I can not withhold my judgment.

#### THE ILLINOIS CENTRAL RAILROAD MATTER.

The testimony with regard to the part which Mr. Brandeis assumed in this transaction fully appears in the record. I will not review it because, in my opinion, there is nothing whatever in it which reflects in the slightest degree upon anybody connected with it.

#### THE NEW YORK AND NEW ENGLAND RAILROAD CASES.

It is difficult for me to disassociate my general information with respect to this matter from the testimony introduced before the subcommittee. Inasmuch, however, as there is nothing in my information, or the testimony, to connect Mr. Brandeis with the conspiracy which I believe was formed to wreck the New York & New England Railroad and turn it over to the New York & New Haven Railroad, the difficulty I have mentioned is not important.

The facts are that in 1892 Austin Corbin, then a well-known capitalist and promotor in New York, who had theretofore been connected with the New York & New England Railroad, but who had lost control, began an attack upon the credit of the company and the conduct of its management. Personally, I have no doubt that this attack was the beginning of a campaign, the end of which was to be the complete control of the New York & New Haven, but there is no direct evidence in the record of this unlawful purpose.

For obvious reasons Corbin did not want to bring the suits in his own name, and he sought small and obscure stockholders to effectuate his design. His attorney in New York was William J. Kelly, then a practicing lawyer, now a judge of the Superior Court. Kelly employed Brandeis, and also found in Boston a wholesale liquor

firm, composed of N. F. Goldsmith and Walter H. Keith, which owned a few shares of the common stock of very little value. Goldsmith & Co. and one E. H. Knowlton, of New York, the owner of a few shares of the preferred stock, became the plaintiffs in something like 10 suits brought in Massachusetts, Connecticut, and one or two other States against the New York & New England Railroad Co., which had for their ultimate object the appointment of a receiver. The agreement between Corbin and Goldsmith & Co. by which the latter agreed to act as plaintiff was of the most discreditable character. Its terms became known because the New York & New Haven in the course of time assumed the burdens of the litigation. The suits had the desired effect. The New York & New England became hopelessly involved, and the New York & New Haven became its owner.

If Mr. Brandeis had known all that was going on he could not escape the severest condemnation, but there is no satisfactory testimony that he was informed of Mr. Corbin's object, or knew anything about the relation of the New York & New Haven to the conspiracy. So far as we are advised by the evidence, all that Mr. Brandeis knew was that Goldsmith & Co. and Knowlton, were not his real clients. He was retained by Mr. Kelly, paid by Mr. Kelly, and while he was aware of the relation between Corbin and Kelly, there was nothing in the record to convict him of complicity in the very questionable undertaking. All that I can say is that it leaves in my mind a doubt concerning the extent of Mr. Brandeis's knowledge of this affair, and I am not disposed to hold him responsible.

I have not referred to the pages of the record, because the material parts are carefully quoted in the separate views of my colleague, Senator Works, and anyone who desires to read the testimony will there find the references necessary to a full examination.

#### THE BOSTON & MAINE MATTER.

When the New York & New Haven Railroad Co. sought to acquire the Boston & Maine there were certain stockholders, among them a Mr. Lawrence, who resisted the merger, and it is to be assumed that the resistance was in part at least to protect what they believed to be their pecuniary interests. There was also resistance from a great many people based solely upon public policy. Mr. Brandeis and his firm were retained by these stockholders, and in connection with the employment a most remarkable incident occurred. It is said Mr. Brandeis felt that he ought to render his service without compensation, but that his partners should not be deprived of the fees which would otherwise have accrued to the partnership. In this situation Mr. Brandeis paid to his partners \$25,000 out of his own funds and rendered his service without pay. This payment was not solicited by his partners, but accepted by them rather under protest.

I have not been able to fathom the motive for this transaction. In so far as the stockholders represented by Mr. Brandeis were concerned no one could question the propriety of an appearance by Mr. Brandeis nor the acceptance of compensation. In so far as the public generally was concerned Mr. Brandeis ought not to have represented anybody as an attorney and there should have been no compensation for work done to promote the common good. The controversy was carried on mainly before the Massachusetts Legislature, but in part through the ordinary avenues of publicity.

Personally I am of the opinion that a lawyer has no right to appear before a committee of Congress or a committee of a legislature as an attorney to urge questions of public policy. He has a right as a citizen to become a part of a movement and to be the spokesman of the movement but in so doing he is not an attorney or representative. He is speaking for the people of whom he is one. In such a situation there ought to be no clients whose pecuniary interests are to be served or protected.

All that I can say of the singular performance is that Mr. Brandeis furnished the opportunity for serious criticism and at the best indicated that his view of duties and responsibility was somewhat abnormal. It is not strange that those who looked at the incident from the outside were skeptical and suspicious. I pay no heed to the charge that in the course of the campaign Mr. Brandeis made untruthful statements for I have thought it impossible to examine at this time the complicated facts which were then in dispute.

#### OTHER CHARGES.

The subcommittee heard a great deal of testimony concerning a variety of other charges, namely, the relation of Mr. Brandeis to the Equitable Assurance Society of New York, the solicitation of proxies to enable Mr. E. H. Harriman to control the Illinois Central Railroad, misconduct in regard to the Gillette Safety Razor Co., the connection with the Old Dominion Copper & Smelting Co., the appearance before the Massachusetts Legislature for the liquor interests, the Consolidated Gas transaction, and the activities for the bill in Congress authorizing manufacturers and producers in certain instances to fix retail prices.

I find nothing in any of these matters to warrant extended comment. There are some things in them which might be regarded as of doubtful propriety, but they admit of fair difference of opinion. All that I care to do is to commend the testimony to the full committee.

#### CONCLUSION.

In view of all the matters to which I have referred I have been constrained to reach the conclusion that the nomination of Mr. Brandeis as a justice of the Supreme Court ought not to be confirmed. My conclusion is the result of much reflection, and it is with great regret that I announce it. I am acquainted with Mr. Brandeis, and for the strength of his mind and the scope of his knowledge I have the profoundest admiration. Moreover, I am in sympathy, for the most part, with his sociological and economic opinions, and for the work that he has done in these directions I have nothing but commendation. I can not, however, even seem to approve his course in many of the matters which have been brought to the attention of the subcommittee, through which he has lost the confidence of so large an element of the profession of which he is a member and of the country of which he is a citizen as to vitally impair his usefulness as a justice of the Supreme Court.

ALBERT B. CUMMINS.

APRIL 3, 1916.





## NOMINATION OF LOUIS D. BRANDEIS.

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Mr. WORKS, from the subcommittee of the Committee on the Judiciary, submitted the following

### VIEWS.

[To accompany the nomination of Louis D. Brandeis.]

To the COMMITTEE ON THE JUDICIARY,  
*United States Senate:*

It has often been said that the Supreme Court of the United States is the greatest judicial tribunal in the world. This assertion may well be accepted when we consider the vast and controlling powers of the court—its jurisdiction over a hundred millions of people whose lives, liberties, and independence are in its keeping; its control over the business of a great, rich, and powerful nation and its protecting power to preserve our free institutions and the Federal Constitution even to the extent of nullifying laws enacted by Congress and the States. No such far-reaching powers are vested in any other court in the civilized world. The acts and proceedings of every department and every officer of the Government, from the President of the United States down, is subject to its decrees, and from its decisions there is no appeal. They are final and conclusive.

The appointment of a member of such a tribunal involves the gravest responsibility and should call for the exercise of the highest degree of disinterested patriotism, free from political, religious, or race interests or prejudices. To fit any American citizen to fill this exalted and responsible position his ability must be undoubted, his character above reproach, his integrity beyond suspicion, and his fairness and the judicial character of his mind fully established. It may be that this standard of fitness has not always been maintained in making such appointments, but it is the standard that should guide and influence the appointing power. The President has exercised this power, in the present instance, so far as it rests with him, by appointing Louis D. Brandeis to be a justice of the Supreme Court. The responsibility now rests with the Senate of the United States. Our responsibility, individually and collectively, as Members of the Senate, is just as great as was that of the President in making the nomination. Our duty and responsibility, it may also be observed, is to the country and not to the President.

It is most unfortunate that the nomination of Mr. Brandeis for the office should have given cause in the minds of any one for an investigation, or that any inquiry into his fitness should have become necessary. But the investigation has been called for and has been held. The fullest opportunity has been given to all who had any showing to make, for or against him, to present the facts in their possession and their views. It is my purpose to review here the charges made against him and the evidence given before the subcommittee to support and to refute them.

#### THE RAILROAD RATE ADVANCE CASE.

The charge is made that Mr. Brandeis betrayed his clients in this proceeding in the Advance Rate case and acted in bad faith toward his associate counsel, and evidence was submitted to support the charge. The position of Mr. Brandeis in the case was a peculiar and anomalous one. He was not employed as attorney for any of the litigant parties and therefore he had no clients to whom he owed a duty resulting from an employment as such. He was called into the case by the Interstate Commerce Commission, the tribunal before which the case was to be tried, a proceeding well calculated to bring about just such an unfortunate condition as the one that resulted in this case, and one that, in my judgment, should not be allowed in any case. Almost inevitably counsel coming into such a controversy in that way will be given greater consideration and his opinions and admissions given greater weight than those of the attorneys for the adversary parties. Mr. Brandeis's authority, so far as it was disclosed at the hearing, was contained in a letter from the commission to him. It was said in the letter:

We are, of course, aware of the fact that the carriers will not fail fully to present their side of the case, and *the commission has felt that every effort should be made, in the public interest, adequately to present the other side.* Would you care to undertake that burden? \* \* \* I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of *seeing that all sides and angles of the case are presented of record without advocating any particular theory for its disposition.*

This letter which constituted the authority of Mr. Brandeis to act in the case was about as ambiguous as it could well have been made. In the first clause of it he was, in plain and unambiguous terms, made the representative of the interests opposed to the railroads, "in the public interest." In the latter he was expected to "undertake the task of seeing that all sides and angles of the case are presented of record."

But, however that may be, Mr. Brandeis himself construed the letter as imposing the duty on him of representing the interests of the shippers and others opposed to the railroads and aiding them to support their defense against the raising of rates. He took place at the table occupied by the attorneys for the shippers, consulted and acted with them throughout, and in the division of time for argument took a part of their time. In the division of time Mr. Brandeis was given the closing argument on behalf of the shippers. The issues to be discussed were stated by the commission as follows:

First. Do the present rates of transportation yield adequate return to common carriers, the railroads operating in official classification territory?

Second. If not, what general course may the carriers pursue to meet that situation. (Hearings, p. 12.)

After this statement of the issues 20 days were given all parties to prepare briefs, oral arguments to follow. Mr. Brandeis in the brief prepared by him directed his attention chiefly to the second issue and did not disclose his position on the first. At the oral argument, after the other attorneys for the shippers had made their arguments, and without previous notice to them, he made this broad admission:

First, that on the whole the net income, the net operating revenues of the carriers in official classification territory, are smaller than is consistent with their assured prosperity and the welfare of the community, and that this is notably true of the central freight association lines, and it is true practically as to other lines also because of the central freight association scale. (Hearings, p. 20.)

This, as I construe it, was to admit away, as against the interests he was called upon to represent and protect, the first and chief issue in the case. Clifford Thorne, chairman of the State Board of Railroad Commissioners of Iowa, presented this charge against Mr. Brandeis and the evidence to support it. He prefaced his testimony on the merits with this statement:

In the first place, the gentleman whom you have under consideration, I believe, was guilty of infidelity, breach of faith, and unprofessional conduct in connection with one of the greatest cases of this generation. (Record, p. 8.)

And in stating the effect upon him of Mr. Brandeis's admission above mentioned he said:

I was simply dumbfounded by this statement. This was not an ordinary case. The railroad had been fighting for four years to get that fact established which I have just read to you before the Interstate Commerce Commission. They had maintained a propaganda, Nation wide in extent, in magazines and newspapers and had made speeches everywhere, and had brought pressure to bear in every conceivable manner. \* \* \* And in the closing argument, after every other party on behalf of the public had concluded, the special counsel for the commission appointed to see that all phases of the case were developed, in the final closing argument on behalf of the public, without any notice or warning to other counsel taking part in the argument, he concedes the very point in issue and set down for argument. (Hearing, p. 21.)

There can be no doubt of the sincerity of Mr. Thorne's views or his feeling that by the admission made by Mr. Brandeis, under the circumstances, the public interests were betrayed and that the course taken by him was unfair to other counsel and unprofessional.

On the other hand, John M. Eshleman, a very estimable and reliable gentleman, formerly chairman of the Railroad Commission of California, and later lieutenant governor of California, and who died suddenly soon after this testimony was given, and Joseph N. Teal of Portland, Oreg., an attorney at law, who has had large experience in cases of this kind, gave it as their opinion that Mr. Thorne had no just reason to complain of the conduct of Mr. Brandeis. But both of these gentlemen agreed that his admission was not justified and that the rates were adequate and should not have been increased. And the following extract from Gov. Eshleman's testimony shows that he differed from Mr. Thorne only because their construction of the letter under which Mr. Brandeis acted differed:

Senator CUMMINS. Governor, it seems to me that there is not much difficulty about the controversy between you, if there is one, and Mr. Thorne?

Mr. ESHLEMAN. We have no controversy, Senator.

Senator CUMMINS. It all depends, I think, upon the relation which Mr. Brandeis bore to that case. You look upon his appointment as an advisor to the commission, and you look upon his argument before the commission as the delivery of a judicial opinion, whereas, I take it, Mr. Thorne supposed that he was counsel for the general public and was associated with him in the defense.

Mr. ESHLEMAN. I think that is our main difference.

Senator CUMMINS. That is the real difference?

Mr. ESHLEMAN. Yes. (Hearings, p. 66.)

So it is left to the committee and finally to the Senate to determine whether Mr. Brandeis's course in the matter calls for condemnation or not.

There is nothing in the evidence to show that, in making the admission complained of, Mr. Brandeis was moved by any ulterior or improper motives. Whether he was justified in making it as a result of the evidence could only be determined by a retrial by the committee of the rate case, which is manifestly out of the question. Mr. Thorne maintains stoutly that the evidence did not justify or support the admission. In this conclusion he is supported by both Gov. Eshleman and Mr. Teal. But his final justification must rest upon the decision of the commission, which was in accord with this admission. But, very naturally, Mr. Thorne and others interested with him maintain that the conclusion reached by the commissioners resulted from this very admission made by counsel specially appointed by them. Whether this is so no one can tell, but it is only fair to conclude that such an admission made under such circumstances must have been given weight in the final decision of the case.

As to Mr. Brandeis's duty in the matter, independently of the question whether or not the admission was justified by the evidence, it seems to me that any fair mind must conclude that the wise, the prudent, and the fair thing for Mr. Brandeis to have done when he concluded to make the admission would have been to inform the attorneys with whom he had been acting of his intention and give them an opportunity to meet and refute it if they could. His relations with Mr. Thorne throughout the trial had been intimate and confidential. He had commended Mr. Thorne for the able presentation he had made of the shippers' case. There was no intimation from him that he disagreed with Mr. Thorne as to what the decision should be. To make the admission he did and at the time and under the circumstances was, to my mind, exceedingly unfair to Mr. Thorne and to the interests he represented; besides, there is a serious question in my mind whether Mr. Brandeis was justified or warranted in making any such admission under any circumstances by virtue of his employment. He was employed "adequately to present the other side" as against the railroads, who "will not fail fully to present their side of the case" and to see "that all sides and angles of the case are presented of record." In short, he was employed to see that the case was fully and fairly presented to the commission for its decision and not to decide it himself.

#### THE UNITED SHOE MACHINERY CO.

It is charged that Mr. Brandeis was from 1899 to 1906 a director and the attorney of the company. That he represented on the board of directors the large interests of the Henderson family of Chicago.

That he participated in and approved the organization of the company and the form of leases made by it and was familiar with all its business and affairs. That, as its counsel, he defended its leases when legislation was sought against them, and that afterwards he acted as counsel for certain shoe manufacturing companies which were opposing the leases and which had formed themselves into an alliance to defeat their conditions. That in that capacity he gave a written opinion assailing the leases that he had formerly approved and in addition appeared at the hearings before committees of Congress and assailed the business of the company of which he had been a director and its attorney, during which time it had conducted its business the same as when his attack was made. The charge and the evidence to support it will be found in the testimony of Sidney W. Winslow, president of the company, commencing on page 160 of the hearings. It consists very largely of quotations from Mr. Brandeis at the hearings while he was connected with the company and afterwards. I think a few extracts from his declarations will present with sufficient accuracy what is claimed to be his equivocal and contradictory positions for and against the company and its mode of doing business. But first let me quote the charges made by Mr. Winslow. He says:

He acted as counsel for the company in many matters for nearly eight years. In 1906 he took practically entire charge of the company's opposition to a bill proposed in the Massachusetts Legislature designed to restrict the company's leases. He then expressed the firm conviction not only that the company's leases were legal and that the Legislature of Massachusetts could not constitutionally limit their scope but also that they were of great benefit to the shoe manufacturers. As late as October 5, 1906, he wrote Mr. Erving Winslow a personal letter expressing his moral approval of the Shoe Machinery Co.'s system of business.

He resigned as director of the company in December, 1906, giving as a reason that he felt he ought not to continue an exception to his general rule of not holding the office of director in any corporation for which he acted as counsel.

Never during his connection with the company did he express disapproval of any of their acts, methods, or policy. On the contrary, the company's method of conducting business met with his full approval.

I believe that Mr. Brandeis, since he left our company, has been guilty of unprofessional conduct and of conduct not becoming an honorable man, in the following:

First. Mr. Brandeis has, at the instance of new clients, attacked as illegal and criminal the very acts and system of business in which he participated, which he assisted to create, and which he advised were legal, and he has persistently sought to injure our business. In so doing, his knowledge of our leases and business, acquired while acting as our director and counsel, has naturally been of value.

Second. Owing to his long-extended connection with our company as director and counsel and his acquaintance with our affairs, Mr. Brandeis's statements as to our methods and business have naturally carried an authority which would not otherwise have been accorded them. An honorable man, when acting for other clients, would, in these circumstances, have been scrupulously careful that any statements made by him were truthful. Mr. Brandeis, however, has made false and misleading statements as to our acts and business, both to committees of Congress and elsewhere.

\* \* \* \* \*

He spoke before the joint judiciary committee of the Massachusetts Legislature in opposition to the bill. He filed a brief with the chairman of the committee, in which he contended that the proposed act was unconstitutional, and he drafted a letter for the United Co. to send to shoe manufacturers urging them to oppose the bill.

In his remarks before the joint judiciary committee on April 18, 1906, he strenuously defended the lease system employed by the United Co., and explained how it benefited the shoe manufacturer. He stated that the system then employed was not materially different from the system employed by the predecessor companies which had been merged into the United Co. There has been no substantial change of any kind in the lease system since Mr. Brandeis appeared before this legislative committee.

Then he quotes Mr. Brandeis's own language in support of the leases, as follows:

"If we do not have this clause in certain of the leases where we have it, we could not sell certain things we do sell. We could not lease certain things which we do lease at as low a price as we do. It is only on account of the volume of business that we are able to undersell other people."

Referring to the charge of monopoly brought against the company, he said:

"It has been said that this is a monopoly. In part it is a legal monopoly absolutely granted, because all the machinery we sell—I mean all that we lease or sell, because some we lease, some we sell, and with some we do both—all of the important machines are patented machines. The Federal law means that we shall have a monopoly of those, and nothing in the State can take it away or limit it. We have also a very large part of the business outside of the necessarily patented machines, and why we have it is because we are able to give to the people those machines cheaper than other people, and that is a complaint that is made against this company, that we are giving them cheaper. That is the main complaint."

With reference to the charges as to the character of the company's leases, he said:

"The terms that these gentlemen say are in the leases are not in the leases, taken down as they say. It is not true that if you take one of our leases you can not use any other machine. That is not true. Take the manufacture of the Goodyear turn shoes, which Mr. Storrow spoke about, where he said there were 96 machines used, that we make, that we lease, or some of them that we sell. You would suppose from statements that have been made that if a man took any of those machines he had to take them all. That is absolutely untrue."

He pointed out the benefits conferred on manufacturers by the repair service furnished them by the United Co: He declared that nobody could possibly say that the company was selling things too dear or leasing things too dear "when the cost in every branch of shoe manufacture has gone up from 33 to 50 per cent over every other department it has actually gone down in ours," and he declared that the company was able to do this and still make a good profit "because of the extraordinarily able management of this company and because of the fact that we are doing things wholesale."

He then declared that the company was entitled to commendation because "it is the greatest promoter of competition that there is," and there was not a manufacturing business in the United States in which there was the same freedom of competition that there was in the shoe-manufacturing business. He said:

"That happy result is due largely to the methods adopted by this shoe-machinery company, and the predecessor companies combined together to form this company \* \* \*. I deem it to be the fundamental or most important fact existing in business that the smallest man who makes 50 or 100 pairs of shoes a day has just as great advantage as the man who makes 20,000 pairs of shoes a day."

\* \* \* \* \*

I say that it is the best thing that can happen to the shoe manufacturer because he is able to get on in business. He is able to engage in it without sinking his capital. The little man gets the new improvements just as the big man gets them, and some of the men who are doing a large business thought it was very unfair, because they can buy their leather cheaper, because their credit was better, because they could buy a million dollars' worth at a time, and the only thing in the whole business they can not buy cheaper was their shoe machinery or shoe-machinery material.

In the letter which Mr. Brandeis drafted to be sent to the shoe manufacturers there occurred the following statements:

"This bill, which is aimed confessedly only against the United Shoe Machinery Co., attacks the policy hitherto pursued by this company and its predecessors in the leasing of machines, and seeks to prohibit more particularly the practice of this company in supplying to our lessees auxiliary and general department machines on exceptionally advantageous terms.

"We believe that the methods pursued by our company in the past have been greatly to the interest of shoe manufacturers, and that if this bill is enacted and becomes operative it will compel changes in our methods of dealing with Massachusetts shoe manufacturers which would increase the cost to them of machinery and deny to them facilities enjoyed by their competitors in other States.

"We believe that the Massachusetts shoe manufacturers would be far more seriously affected than our own company by the enactment of such a bill, and that effort to defeat it should be made by you rather than by us."

Mr. Winslow refers to the hearings before the Interstate Commerce Committee of the Senate to show that Mr. Brandeis decided in September, 1910, that he o—

effort to attack the company. He had then severed his connection with the company and was acting as counsel for the Shoe Manufacturers Alliance. But prior to that time he had given an opinion to Charles H. Jones, president of the Commonwealth Shoe & Leather Co., in which he said:

First. The United Shoe Machinery Co. is a combination in restraint of trade, and all contracts made by it, as essential parts of the combination or to carry out the purpose of monopolizing and perpetuating its monopoly of the shoe-machinery trade, are unlawful. The leases used are such contracts and are unlawful.

Second. The leases are in themselves, aside from the unlawful combinations embodied in the United Shoe Machinery Co., restraints on interstate trade within the Sherman Act.

Third. The fact that the United Shoe Machinery Co. was formed to deal in patented articles does not prevent the illegality of the combination nor does the fact that the leases are of patented machines render them legal, since the purpose of the combination and the provisions of the leases are designed to create a monopoly beyond that conferred by the patent laws.

Fourth. The leases being invalid, you can not be held liable for failure to perform. (Hearings, p. 163.)

Of this opinion Mr. Winslow says:

It is to be noted that Mr. Brandeis in this opinion not only attacks the form of leases which he had previously approved of, but also attacks the organization of the company in which he participated, declaring the company to be a combination in restraint of trade.

The above quoted portion of this opinion was printed presumably with Mr. Brandeis's consent as an advertisement on or about July 8, 1910, in the Boston newspapers, together with other opinions as a part of Mr. Plant's campaign to force the United Co. to buy his patents.

The Shoe Manufacturers' Alliance, which Mr. Brandeis represented from 1911 on, was an association of a few large shoe manufacturers, including Charles H. Jones, but most of whom were located in the West. Their platform, as quoted by Mr. Brandeis (see hearings before Committee on Interstate Commerce, United States Senate, 1912, p. 2618), declared:

"We believe it to be essential that shoe machinery, whether it be leased or sold, be put out on such terms as will leave the manufacturer free to take from the United Co. or from any other company one or more of the same or of different machines at a fixed unit price."

In other words, these manufacturers, according to their program as quoted by Mr. Brandeis, sought to compel the United Co. to give up the wholesale price which it granted where a series of different machines leased from it, all cooperating in the manufacture of a single pair of shoes, were used. The fact that we offered such a wholesale price instead of a unit price, Mr. Brandeis in 1906, before the joint judiciary committee of the Massachusetts Legislature, had spoken of as the reason why we could offer our machines at such reasonable rates and as of the greatest advantage to the shoe manufacturer.

From this time on Mr. Brandeis has attacked our company in every way possible. (Hearings, p. 163.)

In addition to this it is claimed by Mr. Winslow that Mr. Brandeis made many false and unwarranted statements against the company which are specifically pointed out by him in his testimony. (Hearings, 164-168.)

These facts, supported by quotations from Mr. Brandeis, stand undisputed. During the time he was attorney and director for the United Machinery Co., Mr. Brandeis was attorney for certain shoe manufacturing companies unknown to Mr. Winslow, but it does not appear that, up to the time he severed his connection with the United Machinery Co., there was any conflict of interest between them. The open conflict and attack on the machinery company came later.

Mr. Brandeis's statement and explanation of his apparently inconsistent positions in this matter will be found in a letter from him to Senator Clapp, the chairman of the Interstate Commerce Committee. (Hearings, pp. 217-221.)

The letter is very long but it is illuminating and should be read in full. I extract here some of its statements:

First. *It is entirely true that in April, 1906, I believed the policies and methods of the United Shoe Machinery Co. were legally and morally unobjectionable and that its activities were beneficial to the public, and as a director of the company I appeared before the Massachusetts Legislature to oppose a bill seeking to compel a change in these methods.* I was then of the opinion that under some conditions monopoly in industry could operate beneficially to the public; or, in other words, that there were "good trusts" as well as "bad trusts." I believed, not unnaturally, that this company which was managed by men in whose ability and judgment I then had confidence and with which I was myself connected, was such a "good trust." The particular ground upon which I based my opinion that the shoe-machinery monopoly operated beneficially was that it appeared to help the small manufacturer and thus, while itself a monopoly, promoted competition in shoe manufacturing, as stated in my testimony before your committee on December 14, 1911, page 1160, as follows:

"The United Shoe Machinery Trust, with which Senator Crane is also familiar, presents another example. There is a business monopoly, which was started under conditions the most favorable to serving the public of probably any in the field of industry. In the first place the trust was managed by the men who had made the greatest success of any in the shoe-machinery business. It was practically an acquisition of the leading shoe-machinery businesses by the men who were the ablest, the hardest workers, and, in a certain sense, the furthest seeing of all those engaged in the business. They started out with certain perfectly admirable principles, which, I understand, have been adhered to. In the first place everybody, big and little, was to be treated alike; there were to be no discounts for quantity; so that the small manufacturer had the same chance as the large manufacturer, both in respect to service and to royalty. The company adopted a system of leasing, which gave an opportunity to the small manufacturer with little capital to go into the business, and the company gave them as good service as the large manufacturer."

Second. In May, 1906 (about a month after I had appeared before the committee of the Massachusetts Legislature), Mr. W. H. McElwain, president of the W. H. McElwain Co., and Charles H. Jones, president of the Commonwealth Shoe & Leather Co., both able and public-spirited shoe manufacturers, who agreed generally with my then views as to the value of the United Shoe Machinery Co. to the community, called my attention to certain features in their leases—notably the so-called tying clauses—which seemed to them objectionable. I was not convinced that their objections were sound; but we were all of the opinion that the proper course to pursue was for the manufacturers to discuss any supposed objections with the officials of the company and not resort to the compulsory processes of legislation to correct defects, which should, if existing, be removed by amicable conference. And President Winslow expressed his readiness to give full consideration to such objections if the pending bill were defeated. Thereupon Mr. McElwain, Mr. Jones, and E. J. Bliss (treasurer of the Regal Shoe Co.), and other leading Massachusetts shoe manufacturers joined with the United Shoe Machinery Co. to secure a defeat of the then pending bill.

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Third. In consequence of the objections raised by these shoe manufacturers the subject was further investigated in the fall of 1906. I then ascertained facts in addition to those which had been previously furnished me by Mr. Winslow and other officials of the company, and to some extent inconsistent with statements made by them, and new considerations bearing upon the matter were brought to my attention. I was not yet, however, fully convinced that the shoe machinery company's policy was unsound or its methods improper, but so serious a doubt had been raised in my mind of their methods that I was unwilling to assume responsibility for the company's action; and having reason to believe that Mr. Winslow was not likely to make any change in policy or methods, and having as one of the 19 directors no real control, I therefore concluded, without undertaking to decide definitely whether the criticisms made were sound or not, to quietly retire (without raising the question) from the board of directors, of which I had become a member to represent the large stock interests of the Henderson family in Chicago. I tendered my resignation on December 6, 1906, and it was immediately accepted.



Fourth. Shortly afterwards, about the 1st of January, 1907, when it became apparent that a bill designed to compel the shoe machinery company to change its methods would be introduced at the coming session of the Massachusetts Legislature, Mr. Winslow resumed with Mr. McElwain and Mr. Jones the consideration of those features of the United Shoe Machinery Co.'s policy and leases deemed by them objectionable. At Mr. Winslow's request I participated as counsel in some of these conferences and discussed the whole subject fully also with him and other officials of the company. The facts then developed and the further consideration given the subject convinced me fully that while the policy and methods of the company had, on the whole, operated beneficially up to that time, they must if pursued eventually prove injurious both to the community and the company's interest, and I urged most strenuously upon Mr. Winslow and other officials who participated in the conferences with me that these methods be changed, that the policy of monopoly be abandoned, and particularly that the tying clauses be eliminated from the leases. Mr. Winslow and his associates gave patient consideration to the views which I expressed, but they were not convinced and refused to adopt my suggestion. Our conferences ended on January 7, 1907, and I then ceased to act as counsel of the company. (I had never been general counsel of the company, but had been requested to act frequently as for other clients.)

Fifth. On June 1, 1907, the Massachusetts Legislature enacted a bill to regulate the sales and leases of machinery in form similar to that introduced in the session of 1906. I took no part whatever in opposing or advocating that legislation, and, indeed, did not express publicly my opinion on it. For three and a half years I took no part whatever in the questions relating to the policy and methods of the shoe machinery company, and specifically refused to act professionally for those who had adverse interests.

Sixth. By the summer of 1910 the situation had entirely changed from what it was in 1906. In the first place the United Shoe Machinery Co. had shown a determined purpose to ignore or evade the act prohibiting tying clauses in leases passed in 1907 by the Legislature of Massachusetts and declared by its supreme court to be constitutional. In the second place, the Federal Government had shown its purpose of enforcing the Sherman antitrust law as evidenced by the Standard Oil and Tobacco cases, and the Supreme Court of the United States, in 1909, laid down in the Continental Wall Paper Co. case a rule applicable to the United Shoe Machinery Co. business. But the trust's methods remained unchanged. In the third place, and most important of all, Mr. Thomas G. Plant had developed a complete system of shoe machinery, in which the United Shoe Machinery Co. had previously enjoyed a monopoly. The Plant system was declared by Mr. Jones and other leading manufacturers to be equal to that of the Shoe Machinery Trust, and in some respects superior to it. Mr. Plant was purposing to put it on the market at a cost to the manufacturer far below that charged by the Shoe Machinery Trust. When this purpose was announced the United Shoe Machinery Co. declared that the shoe manufacturers would be precluded from using the Plant system by the provisions of their leases with the shoe machinery company. This attitude seemed to me particularly oppressive in view of the fact that the fundamental patents of the Goodyear welt system, from which the Shoe Machinery Trust secured its largest royalties, had recently expired, and the trust had made no reduction in those royalties. The question was raised whether the trust's business could be used to suppress the Plant system.

It was my opinion that under the rule laid down in the then recent decision of the Supreme Court of the United States in *Continental Wall Paper Co. v. Louis Voight & Sons Co.* (212 U. S., 227, decided Feb. 1, 1909), the leases which had before been believed to be valid would be held invalid under the Sherman law, and I so advised Mr. Charles H. Jones.

It will be seen that Mr. Brandeis, as he says, had received new light since he defended the validity and fairness of the company's leases, and a new statute had been enacted that affected the validity of the company's business methods. It seems, however, that the company's method of doing business had not changed, but that Mr. Brandeis had changed his mind as to the law affecting the validity of those methods. Since then the business methods of the company have been tested by a suit on the part of the Government, which has been decided by three Federal judges in favor of the company, and the case is now pending in the Supreme Court on appeal. (See opinions in that case; hearings, p. 1177 and on.)

In discussing the general subject of trusts and monopolies before committees of Congress, it will be seen that Mr. Brandeis persistently used his former client as an example of the evils of which he complained.

Thus, at the hearing before the Committee on Interstate Commerce, he said:

Now, take, in the second place, the trusts that have been markedly successful, like the Standard Oil Trust, the Shoe Machinery Trust, the Tobacco Trust. They have succeeded through their monopolistic position. They dominated the trade and were able to fix the prices at which articles should be sold. To this monopolistic power, in the main, and not to the efficiency in management, are their great profits to be ascribed (p. 1148). (Hearings, p. 1025.)

This was in direct and marked opposition to the contentions he made before the Massachusetts legislative committee, as its attorney and director, in behalf of the shoe machinery company, which he here denounces as a trust and monopoly.

And it appears from his own statement before the House Judiciary Committee, in dealing with the same subject, that he was not acting in the public interest in the attacks he was making upon his former client. He said on that occasion:

I represent primarily myself, Mr. Chairman, but *I have also acted for a certain number of gentlemen known as the Shoe Manufacturers' Alliance, who had specifically objected to the methods and policies of the shoe machinery corporation, who are therefore interested in this bill*, which undertakes to provide not specifically in regard to that corporation, but generally in regard to trusts and combinations, the present amendments to the law.

So it appears from his own statement that he was representing the Shoe Manufacturers' Alliance, an organization of shoe manufacturers, combined to make this very contest against his former client and against its former course of conduct that he, in the capacity of its attorney and director, had expressly approved and defended.

Attention should also be given to a statement of Mr. Brandeis of the meeting of Mr. Winslow, Mr. Brandeis, and others, in which Mr. Brandeis says he endeavored to induce Mr. Winslow to change the form of the leases, but without success. It is too long to quote here. (Hearings, pp. 221-224.)

This was in 1906, and soon after this Mr. Brandeis severed his connection with the company and took up the affairs of the Shoe Manufacturers Association. Of this Mr. Brandeis says in this same statement made in 1911:

On the 24th, I think it was, of May, the shoe manufacturers, a few of the men who came on at that time to see Mr. Winslow, telephoned whether I could see them. I had never seen or heard of them except in a general way—I think Mr. Endicott once introduced me to George Brown, of the Brown Shoe Co.—they came up and wanted to know whether I would advise with them, and I told them: "Gentlemen, this wholly depends on what you want to do." I said if this is a matter with you merely of a number of dollars for the next five or more years, this does not interest me at all. *I think you are being charged a great deal more than a fair remuneration for the machines, but I don't think it makes any difference*, because I think you pass it on to the consumer, and I think it always was and still is the policy of this company, and one of its great virtues, to treat all men alike; the big man has no rights over the little man, and as long as this is true—and it has been Mr. Winslow's policy as long as I have known anything of the company—and as long as you are treated alike in service as well as in rates it seems to me that for a number of years you will not suffer anything if this goes on, but it will be the community which will suffer and not yourselves. *It seems to me that you have an obligation, and it seems to me to be particularly up to you as shoe manufacturers not to allow a condition of things to continue which, in*

*my opinion, is not consistent with business freedom, and it is not, in my opinion, consistent with the advancement of the art in which you men are engaged, and I believe nothing can be clearer than the fact, which has now been demonstrated, that the ownership and control of the shoe machinery company by one body of men, even if they have all the virtue and all the ability that Mr. Winslow and the others possess, can not do otherwise than to stifle invention and prevent progress.* (Hearings, p. 223.)

By this it appears that Mr. Brandeis had reached a point where he was willing to attack the company he had served for doing business in a way approved by him as its director and attorney, not in the interests of the shoe manufacturers but in cooperation with them as a public duty. It may therefore have been assumed if he had not stated to the contrary at the hearing that the attacks made by him upon the company's methods and practices were made out of a sense of duty to the public, not in the interest of business adversaries or for mercenary reasons.

One of the most singular features of this whole transaction was the fact that Mr. Brandeis made no charge for the services rendered by him to the shoe-manufacturing people, but that he paid his firm \$2,500 out of his own pocket for such services on the theory that he had no right to deprive his partners of a fee for services rendered because he chose to make no charge for what he did. (Hearings, pp. 741, 742.)

But if he could not, neither could his partners who had been with him attorneys for the machinery company.

What construction should be placed upon this course in justice to Mr. Brandeis? It was certainly an act of generosity toward his partners, who seemed not to share his scruples. Manifestly, his purpose was to appear as working disinterestedly for the public good and without pay. This would have been commendable if true, if it did not conflict with his duty as the former attorney of the machinery company. It might well be said that, working as he was in cooperation with the business adversaries of his former clients and in their interests, which led him inevitably to attack the business methods of the company which he had, as its director and attorney, approved and defended, this refusal to accept a fee for his services was evidence that in his own mind such an employment was wrong. That it was an employment as an attorney and not services rendered wholly in the public interest is convincingly proved by the payment by him of the fee to his partners, and his own declaration that he was appearing for them. That being so, the fact that he was serving them for nothing would not help the matter.

I am driven to the conclusion that the course of Mr. Brandeis in the whole transaction is far from commendable and shows a lack of appreciation on his part of the duty of an attorney to his client and a due sense of the proprieties so necessary to be observed by members of the profession.

#### THE LENNOX CASE.

The charge in the Lennox case is that Mr. Brandeis was employed by Mr. Lennox and was by him advised to make an assignment for the benefit of his creditors. That, at the time he was the attorney for one of the large creditors of Lennox, he also by arrangement with the attorney for another large creditor was engaged to protect the interests of that creditor. That he had his partner made the assignee under the assignment. That subsequently Mr. Brandeis denied that

he had ever been employed by or to represent Lennox and claimed he was employed to serve and protect all persons concerned in the settlement of the insolvent estate called by him the "institution." That, later, Mr. Brandeis's firm acting for creditors forced Lennox into involuntary bankruptcy alleging in the petition as an act of bankruptcy the making of the assignment for the benefit of creditors that he had advised him to make. That Mr. Brandeis and his firm collected fees for services rendered the assignee, one of the firm, also for services rendered the petitioners in the bankruptcy proceedings and for services rendered the trustees in bankruptcy, and the fee of the member who served as assignee for the creditors was also turned in to the firm.

To my mind the evidence that Mr. Brandeis was regularly retained and employed by Mr. Lennox to represent his interest is conclusive. It is an admitted fact that his firm was, at the time, the attorneys for one of the large creditors, of which he had full knowledge. It is shown clearly, also, that he afterwards denied that he was so employed and his firm took sides against Lennox and proceeded to force him into bankruptcy. The employment took place under most remarkable circumstances. Mr. Lennox, and his firm, P. Lennox & Co., were in financial difficulty. Abe Stein & Co., of New York, was one of the largest creditors. Lennox applied to Stein for the advancement of money to tide him over. Stein and his attorney, Mr. Stroock, went to Boston to look into the condition of Lennox's business. On the way over, on the train, Stein and Stroock concluded to employ Mr. Brandeis to represent Stein's interests in the matter. (Hearings, p. 1108; Stein's testimony, hearings, p. 1105.)

And in pursuance of this determination Mr. Stroock visited the office of Mr. Brandeis to consult him in the interest of Stein. (Testimony of Stroock, p. 1074, and of Stein, p. 1105.)

Later, and during the same forenoon, Stein and Stroock saw Lennox and after ascertaining his financial condition advised him to secure counsel and suggested that he employ Mr. Brandeis, to which he assented not knowing that Stroock had already seen him and retained him to protect Stein's interests. Stroock agreed to make an appointment with Mr. Brandeis, which he did, and Lennox, Stein, Stroock, and two other gentlemen proceeded to Mr. Brandeis's office.

Mr. Stein testifies that he saw Mr. Brandeis first in company with his attorney, Stroock, while Lennox and the others waited in the other room. Of this Stein testified as follows:

Senator WORKS. Mr. Lennox was not present at the time?

Mr. STEIN. At that moment he was not. Mr. Brandeis then sent for his stenographer and took down every word and all the explanations and all my claims that I had against P. Lennox & Co., and every part and parcel thereof. The stenographer sat there, I guess, for an hour or an hour and a half. During that time, I think, in order to rectify some statements—or not to rectify it, but to verify it—I said, "Mr. Lennox is outside, and Mr. Spalding. May they come in here?" I said, "They may give me some enlightenment."

Senator WORKS. Now, let us know, Mr. Stein, at what stage of this conversation Mr. Lennox came in.

Mr. STEIN. I could not tell you.

Senator WORKS. He was not there at the beginning?

Mr. STEIN. No, sir; but he came in subsequently. I sent for him. I went out myself and told him to come in. Mr. Lennox was then present for the balance of the testimony which Mr. Brandeis took with the stenographer in the room.

Senator WORKS. Do you mean to say that the conversation that occurred between you and Mr. Brandeis and your attorney was taken down, or did the stenographer commence when Mr. Lennox came in?

Mr. STEIN. It was before Mr. Lennox came in. That was all through. Mr. Brandeis said afterwards, "All right, I will take your case." He never stated, for one moment, any conditions why he should not do it. He never mentioned it to me. I was a party at interest and he would have told me—if he had told me there would be a conflicting interest at the start, I would not have given the case to him. I would not have it so that five minutes after I told a man something he could say, "Get out of here. I know all you know."

Senator WORKS. I understand you were employing Mr. Brandeis at that time?

Mr. STEIN. Yes, sir; and then subsequently to that Mr. Lennox gave his testimony, which was taken down by the stenographer. (Hearings, p. 1106.)

After the interview and alleged employment, Lennox, who knew nothing of this, was called in and with Stein and his attorney and Mr. Brandeis, whose firm represented another creditor, Mr. Lennox was examined and cross-examined as to his business and assets and property. But before that, Stein had informed Mr. Brandeis that he claimed for himself some of the goods in the hands of Lennox & Co. by virtue of certain receipts which retained a lien on the property that entitled him to reclaim it as against other creditors, and Mr. Brandeis had dictated the form of a notice to be given by Stein, in his interest, to persons holding or claiming such goods. This had been done at the instance of Stroock for the protection of his client Stein. There is a disagreement as to the time when this notice was dictated. The stenographer in Mr. Brandeis's office says it was done when Stroock was there alone with Mr. Brandeis. (Hearings, pp. 1016, 1077.)

Stroock says it was in the presence of Lennox, Stein, and the other parties. (Hearings, pp. 1074, 1075, 1077, 1095.)

Stroock also testifies that he had an arrangement with Mr. Brandeis that he was to "protect Mr. Stein's interests so long as they did not conflict with some one else's interest." (Hearings, p. 1075.)

The interview that took place in Mr. Brandeis's office when Lennox and the others were present was taken down in shorthand and transcribed. So that we have at least a fair recital of what took place at that time. (Hearings, pp. 774-796.)

It will be seen that Lennox was examined in detail. This was being done by two attorneys, each of whom represented creditors claiming half a million dollars against him and his firm. Mr. Brandeis had stated that his firm represented Weil, Farrell & Co., who Lennox stated held claims against him amounting to \$200,000, and Stein's claim was about \$300,000. And Stein, whose special claims growing out of the receipts above mentioned understood at that very time that Mr. Brandeis was representing him as his attorney, as I have pointed out. He testifies that afterwards Stroock, his attorney, told him that Mr. Brandeis had concluded to represent Lennox. (Hearings, p. 1108.)

This is confirmed by the fact that Mr. Brandeis prepared for him the notice above mentioned, and on that day advised as to his right to retain a certain check for \$25,000 or \$30,000 he had received from Lennox. (Hearings, p. 1107.)

The interviews to which I have referred occurred September 4 and 5, 1907. On the 10th day of the same month Stein and Stroock had another interview, involving Stein's right under his trust receipts. (Hearings, p. 815.)

But at that time, while Stroock and Stein contended that Mr. Brandeis was, under their arrangement with him, to represent Stein

specially, Mr. Brandeis then contended that he was representing all the creditors as attorney for the trustee. To that Stroock replied, "I understood that you were going to act for all, but with the understanding always that Mr. Stein's interests should be protected by you under all circumstances." (Hearings, p. 819.)

This was a very natural inference to draw, considering the peculiar circumstances under which Mr. Brandeis came into the case as above detailed. On the other hand Mr. Lennox understood that he had employed Mr. Brandeis to represent him. (Hearings, p. 1114.)

Part of the examination of Lennox shows quite clearly that a foundation was being laid for the protection of Stein under his trust receipts. I quote:

Mr. B. Your indebtedness to Abe Stein is about \$200,000?

Mr. L. Yes, sir.

Mr. B. And that is all for merchandise?

Mr. L. And money.

Mr. B. That is, a note came due, and he gave you a check to take it up?

Mr. L. No; I sent him over a paper previous to it becoming due.

Mr. B. How recent have been the most recent of your purchases from Mr. Stein?

Mr. L. I have got a lot of skins down there now, and was wondering whether to send them back to Mr. Stein.

Mr. B. Have they been delivered to you?

Mr. L. They were not delivered yesterday. I think they were this morning.

Mr. Stroock. When they are received, where do you hold them?

Mr. L. At Peabody.

Mr. S. At your warehouse?

Mr. L. Yes, sir.

Mr. B. Well, if they have been delivered, nothing ought to be done with them in any way—don't open them up. Don't touch them. How large an invoice is it?

Mr. L. About \$15,000.

Mr. B. What was the last one before that?

Mr. L. The last one before that was within a month.

Mr. B. How much was that?

Mr. L. I should say \$25,000.

Mr. B. Did the goods go to Salem or Peabody?

Mr. L. Both places.

Mr. B. And what before that?

Mr. L. \$20,000, I should say.

Mr. B. How long ago was that?

Mr. L. Ninety days ago.

Mr. B. Where did that go?

Mr. L. Both places.

Mr. B. Before that, what was the last lot?

Mr. L. I remember quite a lot of chinas—\$40,000 worth.

Mr. B. How long ago?

Mr. L. About four months.

Mr. B. Where did they go?

Mr. L. To Salem; or, I think, they were split up—part to one factory and part to another.

Mr. B. Do you recall the lot before the \$40,000 china lot?

Mr. L. I couldn't go back. I could remember four or five lots, but we would work in a good many skins in between—work in a few hundred dozen.

Mr. B. What have you got in process now?

Mr. L. I think a lot of sheepskins of Stein's.

Mr. B. When were they put into the works?

Mr. L. Five or six months ago.

Mr. B. And how large a lot is that?

Mr. L. I should say it was \$10,000 or \$12,000 worth.

Q. What else is there besides the sheepskins?—A. There is a lot which I call "chinas."

Q. Those are Stein's?—A. Yes, sir.

Q. Are they the \$40,000 lot?—A. No; they are \$8,000 or \$9,000.

Q. Is that a separate lot?—A. Yes. (Hearings, p. 777.)

These questions certainly show that Stein's interests were being looked after. It may have been the foundation of the notice sent out for his protection dictated by Mr. Brandeis.

For Lennox's account under this examination of his indebtedness, see hearings, pages 1080 and 1081.

Another very significant conversation took place between Mr. Brandeis, Stroock, and Stein, in which Lennox was called in and again catechized in their presence. The conversation took place on September 11, 1907, and was taken down. (Hearings, p. 815.)

Stein and Stroock were still contending that Mr. Brandeis was employed to represent Stein's interests and Mr. Brandeis repudiated it and claimed that he was representing the trustee. But Stein's rights were fully discussed, Mr. Brandeis giving his opinion of them, and in that connection Lennox was called in and questioned at length about his transactions with Stein, and in the presence of Stein and Stroock was advised and directed what to do. (Hearings, pp. 815, 819.)

Amongst other things, Mr. Brandeis said to Mr. Lennox:

I want to say to you, Mr. Lennox, in Mr. Stein's presence and in Mr. Stroock's, that you must under no circumstances do anything regarding any documents or take any action whatever in regard to merchandise or anything without my knowledge. If anything has been omitted to be done which ought to have been done in the past, it must rest just where it is at this moment. I mean that if you intended to pay a note and didn't pay it, or promised to deliver a deed and did not deliver it, you must not now in any way change the situation.

(Mr. Stroock and Mr. Stein go out.)

Mr. B. I said that to you, Mr. Lennox, in their presence; I told you in the first instance when you came in that I would not let you do anything which would prejudice your position.

Mr. L. I understand that; I am very glad that you took occasion to remind me of it. What is their position?

Mr. B. Well, they have certain papers; I want to ask you a little more about those trust receipts, etc. (Hearings, p. 821.)

Then follows a thorough course of questioning Lennox about what he had done that would affect Stein's interests in which both Stein and Stroock participated.

That it was understood that Mr. Brandeis was to act for Mr. Lennox is made perfectly clear to my mind by the testimony. And he did act for and advised him as to the first important step to be taken by him. He advised him to make an assignment for the benefit of his creditors. This was of serious moment to him for two reasons. It put an end to his business; put his property and that of the firm and his father out of their hands, and gave it over to the creditors, and at the same time constituted an act of bankruptcy that Mr. Brandeis's firm and others afterwards used to force him into the bankruptcy court.

A few brief extracts from the testimony will verify what I have said.

Very naturally Mr. Stroock clung to the idea that Mr. Stein, his client, was to be protected. He said:

MR. STROOCK. The next suggestion is this: Mr. Lennox has agreed that if possible he wants Mr. Stein protected, and, of course, he will be protected. I think, so far as protection can go under these trust receipts, I think they are reasonably safe. Now, do you think that the interests of all would be better subserved by Mr. Brandeis appearing as attorney for trustee of the Lennox family or as attorney for the Stein Co., so that if need be some strong man will be in a position to assert that right, and then have some other person attorney for Lennox & Co.?

To this Mr. Brandeis replied:

I am inclined to think that if we all agree that what we want to do is to distribute this property according to the legal rights of creditors, *I could be more useful to that end by acting for Mr. Lennox instead of for Mr. Stein*; that is, your rights, whatever they are, are rights which would be developed by a proper investigation of the facts, so far as investigation leaves doubts, that is a matter for a just settlement, that is a compromise of doubts, so far as they exist. *I should feel if I were acting for Mr. Lennox as trustee*, that it was the duty of the trustee to see that everybody got his legal rights as nearly as we could make it, and if we could not determine actually the question of law and of fact, that ought to be determined by proper settlement, and I should feel that we ought to have a committee of the creditors with whom the trustee could confer, and if there are any questions of doubt in adjustment, that we get the advice of that committee and through them make the proper settlement.

Then followed, immediately, a discussion between the two attorneys as to Stein's rights. (Hearings, pp. 793, 794.)

Then Mr. Brandeis said:

Now if Mr. Stein is content to stand upon that, I should feel that probably the best interests of all concerned would be subserved *by my acting for Mr. Lennox* and carrying out the plan of action which I have stated, and I feel that instead of our relation with Weil, Farrell being a hindrance, it would be a special advantage, because they would at once say: "Well, those people will see that creditors are properly protected." Of course, in this matter we should not only act for Weil, Farrell & Co., but we should act as trustees for Lennox, and all we could do would be to say, "Gentlemen, *we are acting for this man*, and our friends—people who would otherwise be our clients—are interested all around. *We can not act for them here, but we can assure them a good, square deal.* That is all, and I feel very clearly that so far as Mr. Lennox is concerned, taking his standpoint alone, the only thing for him to do is to give the squarest deal that he can to his creditors. These statements put him in a position where aside from his desires, his interests coincide with his desires. Now, I want you and Mr. Lennox to decide what you want me to do."

He also explained to Mr. Lennox what would be the effect of making the assignment after he had expressed his desire to escape notoriety such as would result from making the assignment. (Hearings, p. 794.)

If Mr. Brandeis was not acting for Mr. Lennox and advising him in his interest then we have two lawyers representing his creditors persuading the debtor, who was without disinterested counsel, to make an assignment for the benefit of their clients.

Mr. Brandeis gave this advice:

The course that I should pursue if it were decided that I should act for you would be to at once prepare and complete an assignment, so that it could be used at a moment's notice, getting your father's signature as well as your own, and having it here so that it could be recorded at a moment's notice; then I should send for Mr. Farrell and somebody from Lee-Higginson's, and tell them the situation, and perhaps get some one from the Lynn banks and tell them the situation, and say that we want to consider with them what we had better do. *If you could get along without an assignment, that, of course, would be desirable; but if we can not, we could have the papers ready to go on record. It is not our wish, but it is the necessity.* I haven't a doubt that if this is done, if an open act occurs, we will have quite a lot of failures right along the line. (Hearings, p. 794.)

Then this further colloquy took place:

Mr. L. Well, what kind of a position does that leave my father and myself in in the meantime?

Mr. B. The position you would be in would be this: You would have transferred your property; the trustee would be in a position where he could employ you to assist him and could make you a reasonable allowance.

Mr. L. Would the business be continued?

Mr. B. The trustee would have to consider with creditors how far it would be desirable to do that. That would have to be passed upon in his discretion; but the reason for doing this, if we made this trust, would be to prevent somebody else stepping in



and doing it, keeping it as nearly as you could in the form in which you would get the better hold. My own feeling is that the best thing for you to do is not to be thinking too much of yourself, but thinking of the best interests of your creditors. If there is plenty there, you have got it safe; if there is not, you will be in the position of having a fair, open, and aboveboard compromise; but I feel that it is for your interests as it is in accordance with good morals that you and your father should be just as frank and fair in the present situation as it is possible to be, and not to do anything that would incite any of the people who have been misled by statements which have been made to take actions which might prove a very serious blow to you and would be a fearful blow to your father. That would be my feeling; Mr. Stroock, I don't know whether you agree with me.

Mr. S. I do absolutely; the situation is a very dangerous one to my way of thinking. This concern, as we appear to find it, had over a million dollars assets outside of their business and more than half a million dollars in their business.

Mr. B. What I should say in regard to this situation would be to simply tell them how I came to be connected with it. I would say that I had never known Mr. Lennox—either of them—nor had anything to do with their business; they came to me with creditors, and we looked into the matter, and it seemed the only thing for all concerned to take this action. Whatever mistakes may have been made or sins committed are past, and the only thing to do now is to deal with absolute squareness and frankness, and we look to that as the best solution for all concerned.

Mr. STROOCK. Mr. Lennox, we will sum this proposition up. The question is whether your best interests with everybody would be subserved, and I think that Mr. Brandeis's suggestion is the best.

Mr. L. I think it is.

Mr. S. Without in any way being a flatterer I think Mr. Brandeis's reputation in the community would best work this out. We will start out substantially under Mr. Brandeis's reputation for giving a square deal, and in the second place he will virtually represent the large interest to start with.

Mr. L. You are speaking now of Mr. Brandeis acting as my counsel?

Mr. B. Not altogether as your counsel, but as a trustee of your property.

Mr. L. I came to you, and I shall certainly do whatever you say—that is why I came to you. The only thing is, I should like to escape as much notoriety as possible.

Thus, Mr. Lennox put himself completely in Mr. Brandeis's hands and declared his intention to follow his advice. I think there can be no reasonable doubt of the fact that this constituted between the two the relation of attorney and client. Mr. Lennox says, at the hearings:

I referred everything to Mr. Brandeis. I acted entirely on his—under his direction. Mr. Stein and Mr. Stroock, and what I had heard of Mr. Brandeis, gave me unlimited confidence in Mr. Brandeis, and I acted upon it. (Hearings, p. 1115.)

It should be said in this connection that Mr. Brandeis made no charge against either Lennox or Stein for services rendered.

The advice given was followed and Mr. Lennox made an assignment to Mr. Nutter, Mr. Brandeis's partner, for the benefit of his creditors. Mr. Lennox employed no other attorney but relied upon Mr. Brandeis for advice until the firm of Mr. Brandeis commenced bankruptcy proceedings against him, or near that time, when Mr. Nutter informed him that Mr. Brandeis was not his attorney and never had been. Of this, Mr. Lennox says:

I supposed Mr. Brandeis was representing me up to the time I met Mr. Nutter in the Columbia Kid Co.'s office. I asked him or said something about, "I had not heard anything from Mr. Brandeis," and he said, "Why should you hear from him?" I said, "As my counsel, I suppose I ought to hear something from him." He said, "He is not your counsel and never was your counsel." That was the first intimation I ever had that Mr. Brandeis was not looking after my interests. (Hearings, p. 1126.)

This led him to employ Mr. Sherman L. Whipple, of Boston, to represent his interests. (Hearings, p. 285.)

When Mr. Whipple came into the matter, November 18, 1907, he was informed by Mr. Lennox and Mr. Stroock of the relations between Mr. Lennox and Mr. Brandeis. (Hearings, p. 285.)

Mr. Whipple then called upon Mr. Brandeis and recounted what Lennox and Stroock had told him, and then said to Mr. Brandeis:

They say that you advised an assignment to your partner, Mr. Nutter, and took all of Mr. Lennox's property and that you now claim that you are not and never have been his counsel, and I thought, Mr. Brandeis, it would be better for me to come right to you and talk over a situation which seemed to me to be serious, because if you did agree with the Lennoxes that you would act as their counsel, and now are acting in a position hostile to them, through this assignment, you will agree with me that a rather serious situation is presented. (Hearings, pp. 286, 287.)

After which this further was said between them:

Of course, that would be a serious situation, but it is not the situation at all; I did not agree to act for Mr. Lennox when he came to me. When a man is bankrupt and can not pay his debts, Mr. Whipple, he is a trustee for his creditors; he has no individual interest; he finds himself with a trust, imposed upon him by law, to see that all his property is distributed honestly and fairly and equitably among all his creditors, and he has no further interest in the matter. Such was Mr. Lennox's situation when he came to me, and he consulted me merely as the trustee for his creditors as to how best to discharge that trust, and I advised him in that way. I did not intend to act personally for Mr. Lennox, nor did I agree to. "Yes," I said, "but you advised him to make the assignment. For whom were you counsel when you advised him to do that, if not for the Lennoxes?" He said, "I should say that I was counsel for the situation." I said, "Yes; but you advised an assignment of all his property, so that your firm became possessed of it, because Mr. Nutter was your partner." He said, "Yes; and I know no one better in the city of Boston than my partner, Mr. Nutter, to execute such a trust as that. He stands high; he has everybody's confidence, and that is why I advised it." I said, "I must say, Mr. Brandeis, it looks to me very much, according to your principles, as if when a man was bankrupt and went to a lawyer, and the lawyer advises him to make an assignment for the benefit of his creditors, he assigns his lawyer with it, very much in the way a covenant runs with land." He said, "Mr. Whipple, I think that is a very unkind and very ungenerous statement for you to make. It impugns my motives and I can only assure you that I had no such motive in doing it. I was merely occupying myself with seeing that this property which was brought into my office in this way, was equitably and fairly distributed among the creditors, and I was looking after the interests of everybody; I was looking after any interest that Mr. Lennox had, if any, if anything should be left after the settlement with his creditors, but, in the first place, looking after the interests of the creditors."

This discloses fully Mr. Brandeis's attitude in the premises.

Subsequently correspondence took place between Mr. Brandeis, Mr. Stroock, and Mr. Whipple in which Stroock maintained that Mr. Brandeis was employed by Mr. Lennox and Mr. Brandeis adhered to his position that he was never counsel for Lennox. In his letter Mr. Whipple said, among other things:

While very likely it may promote no useful purpose further to refer to this unfortunate misunderstanding, yet in fairness I may properly add that both Mr. Coburn and Mr. Spaulding are in accord with Mr. Lennox in his memory of what was said. I am further informed that both Mr. Stroock and Mr. Stein also understood that you undertook to act for Mr. Lennox.

In his reply to this letter, Mr. Brandeis wrote:

There should be no difficulty in removing the misapprehension from Mr. Lennox's mind. When I was originally consulted by Mr. Lennox, Mr. Stroock, and Mr. Stein, it was with regard to some proposed dealings between the Abe Stein Co. and P. Lennox & Co. When, however, I looked into the situation, it was plainly evident that the firm of P. Lennox & Co. was financially embarrassed, and that no such arrangement could take place between the Abe Stein & Co. and P. Lennox & Co., as was suggested. I told Mr. Lennox and Mr. Stroock that in my opinion the situation was one in which the interests and rights of all Lennox creditors would have to be consulted, and that if they and Mr. Stein so desired, we would undertake to act for all the parties in interest, and it was on that understanding that the assignment was made to Mr. Nutter. It was certainly not made for the benefit of Mr. Lennox, but the parties and their respective rights to be served by us were exactly those stated in the assignment. In accordance with this understanding, my firm has acted for Mr. Nutter and thus for those

whom he represented, namely, both the creditors and the assignors in accordance with their respective interests. Consistently with this position, we did not accept any retainer from Mr. Lennox or make any charge to him or to anybody except the assignee. (Hearings, p. 289.)

It is only necessary to refer to the conversation between the parties at the time of the employment, as taken down by the stenographer, to see that Mr. Brandeis was utterly mistaken as to what was said there and the effect of it, to say nothing of the fact that every other person present, five in number, disagreed with his understanding of it.

That what occurred there made Mr. Brandeis the attorney of Mr. Lennox I think there can be no doubt. But he maintained his position to the last and acted against Lennox in the bankruptcy proceedings, which, if he was employed by the latter, was clearly in violation of his duty as an attorney. In the bankruptcy proceedings Mr. Whipple after being employed by Mr. Lennox found occasion to question the right of the attorney appearing for Mr. Brandeis's firm to appear against Lennox in the bankruptcy proceedings because of his employment by Mr. Lennox.

Again, Mr. Whipple wrote:

Since receiving your letter of the 21st Mr. Stroock, in a personal interview with me, confirms Mr. Lennox in his recollection that you stated you would act as Mr. Lennox's counsel.

In view of the clear and consistent memory of these four gentlemen, Mr. Lennox insists that your own memory must be at fault, and that there is no misapprehension in his own mind.

He says (and I think you also told me so) that a stenographer was present during all the conversations that you had with the respective parties. We ought to be able to get light on this question from her notes. Will you be good enough to inform me whether they altogether confirm your own memory as to what was said on that occasion of the first two interviews? I will await information on this point before writing further. If you could give it to me some time during the afternoon, before 4 o'clock, it would oblige me, as I shall be absent from the city to-morrow. (Hearings, p. 292.)

The copy of the stenographer's notes was not furnished although Mr. Brandeis had them. Instead he replied:

I am quite sure that if Mr. Stroock will go over the matter with me there can be no difference of recollection as to what actually occurred. If you will arrange with Mr. Stroock, I should be glad to see you and him either Wednesday or Friday of this week, if that will be convenient to you. (Hearings, p. 292.)

Mr. Brandeis wrote Stroock asking for a conference and inclosing a copy of his letter to Whipple defining his position. (Hearings, p. 294.)

To this Mr. Stroock replied as follows:

DEAR MR. BRANDEIS: I acknowledge yours of the 30th ultimo, with which you inclose copy of letter which was sent by you to Mr. Whipple on the 25th instant, and a copy of Mr. Whipple's reply thereto. When I am next in Boston, I shall endeavor to meet you with Mr. Whipple, as suggested in your letter. In the meantime, I may remind you that I have met Mr. Whipple and repeated to him my recollection of the conversation which took place between yourself and the writer and Mr. Lennox, which summarized, amount to that which I have heretofore stated and written to you; that you were retained by and accepted the retainer of the firm of P. Lennox & Co. and of James T. Lennox. (Hearings, p. 294.)

To which Mr. Brandeis replied:

DEAR MR. STROOCK: I have yours of the 2d. When I have the opportunity of meeting you and Mr. Whipple, I think you will find that there is an error in your recollection that I was "retained by and accepted the retainer of the firm of P. Lennox & Co. and of James T. Lennox" if that expression is used as meaning anything more than that at their instance I undertook to act in this matter, as I have acted, namely, as counsel for the trustee for creditors and debtor under the assignment.

I think that you will find that my letter to Mr. Whipple of November 21, of which I inclose you a copy, states accurately the situation. (Hearings, p. 295.)

It is evident that Mr. Whipple was convinced of Mr. Brandeis's employment by Lennox, for he says:

As the record shows, I afterwards made some pretty vigorous protests on the record as to Mr. Brandeis continuing to act for parties who were hostile to Mr. Lennox. (Hearings, pp. 295, 298.)

See further on this subject some of the proceedings in the bankruptcy in which Mr. Studley, acting for Mr. Brandeis's firm, appeared against Mr. Lennox, and Mr. Whipple for him. (Hearings, pp. 1007, 1008, 1011.)

In this hearing this colloquy took place:

MR. WHIPPLE. If I thought you asked the question in good faith for the trustees, and not in bad faith as representing Weil, Farrell & Co. and the execution of their threat of criminal proceedings, I would withdraw the objection, and it is on the latter ground explicitly that I direct him not to answer.

MR. STUDLEY. I should like to have a hearing on that question.

MR. WHIPPLE. You will have a lot of them before we get through with it. I propose to summon witnesses to establish the fact. When we have a hearing on that, we will have a hearing that will take more than a few minutes to dispose of, because we will examine witnesses, and you know who they will be.

MR. STUDLEY. I don't know what you are talking about. Perhaps you do.

MR. WHIPPLE. You had better know. When you want a hearing on that, you will have to give more notice than this.

MR. STUDLEY. I don't understand you place the objection on the ground the testimony is likely to incriminate him?

MR. WHIPPLE. You may infer from what I have said that is the ground, because I have said you are asking that question in order to get your client into jail as further violation of your duty to him as an attorney.

MR. STUDLEY. I should suppose you would put it on some ground which the witness had a right to set up.

MR. WHIPPLE. That is a right which he has set up, to decline to be cross-examined for the purpose of carrying out a purpose of getting him criminally complained of—you, unfortunately, so far as it appears now, still being his own counsel.

MR. STUDLEY. If we are still his counsel, it is a matter of which I am ignorant. I had supposed for more than two years you have acted as his counsel.

MR. WHIPPLE. Not discharging your firm from his proper retainer and agreement. Because of your recreancy of your duty, he had to get additional counsel.

Q. This letter, which I show you, refers to certain morocco factories. Will you tell what you referred to by those?

MR. WHIPPLE. That I object to on the same ground. I object to any question.

MR. PROCTOR. Would you object if Mr. Hall should ask the question?

MR. WHIPPLE. I do not believe Mr. Hall would do it, because he has no retainer to abet any such purpose as disclosed before the referee. He will ask only those questions which he desires to ask in good faith to get information, and not for purposes of criminal prosecution. If there are any questions which Judge Hall wants to ask on the subject matter of that letter or any others, I should like to hear them.

MR. STUDLEY. I would like to ask on that one. That did not come from Weil Farrell or through Weil Farrell?

MR. WHIPPLE. Anything that is asked for real information, and not for sinister purposes.

It must be remembered, in reading this extract of the proceedings, that Weil Farrell & Co., was the firm for which the firm of Mr. Brandeis was attorney at the time Mr. Lennox claims he retained Mr. Brandeis as his attorney.

Of the activity of Mr. Brandeis's firm in the interest of Weil Farrell & Co., who were his clients when Lennox was advised to make the assignment, Mr. Whipple says:

Senator WORKS. This same firm, which Mr. Brandeis was representing before the proceedings were commenced, was the active creditor that brought about these criminal proceedings?

MR. WHIPPLE. Yes; but let me say that while they were in close touch, as I found by correspondence, with Mr. Nutter, and the creditors whom Mr. Nutter controlled

voted for Mr. Farrell for trustee, yet I do not understand that Mr. Brandeis's firm did any active work or took any active interest in connection with the criminal proceedings. (Hearings, p. 804.)

It only remains to inquire what profits accrued to Mr. Brandeis and his firm by his acting as attorney for the "situation" instead of Mr. Lennox. As I have said, he received no compensation from either Lennox or Stein.

The firm did receive the following fees for services in the matter of the Lennox assignment and bankruptcy, as testified to by Mr. McCleennen, a member of the firm:

As counsel for the trustee in bankruptcy.....	\$12,000. 00
As counsel for the assignee for the benefit of creditors.....	9,500. 00
Through Mr. Nutter, fees as assignee.....	14,500. 00
As trustee.....	2,852. 88
For services from time of commencing proceedings in bankruptcy to the adjudication.....	5,000. 00
	<hr/>
	43,852. 88
To this was added for office expenses.....	4,105. 00
	<hr/>
Making a total of.....	47,957. 88

There is no claim, at least there is no proof, that Mr. Brandeis acted corruptly in this matter. The claim is, and the evidence sustains it, that Mr. Brandeis was employed by Mr. Lennox to protect his interests and that he failed to do so, and finally acted directly against him and procured these large fees that came out of Mr. Lennox's property for such services. It is not shown that the advice given Mr. Lennox to make the assignment was not good advice. It is not questioned that his condition was such that either an assignment for the benefit of creditors or proceedings in bankruptcy was inevitable. It is quite evident that Mr. Brandeis's firm profited largely in fees by the making of the assignment and subsequent enforced bankruptcy. Their fees under the assignment before the bankruptcy proceedings, including the assignee's fees which went to the firm, amounted to \$24,000. Such fees in prospect was a strong temptation to advise an assignment. Whether it influenced Mr. Brandeis to advise that course no one can tell.

Of the action of Mr. Brandeis having his partner appointed assignee, Mr. Whipple says:

That is a risk \* \* \* that a lawyer always takes when he advises an assignment to one of his own partners or to himself. That has been a very fashionable and usual thing, but I think it is all wrong, when he has clients to take his assignments to himself. If he has a client who wants to administer an estate that is a risk he assumes, in having himself appointed as administrator. If there is some important thing to do, it is a risk for him to say, "I will do it for you." My idea is that the client or some competent friend of the client should be appointed to his responsible fiduciary position and the lawyer act as his counsel. (Hearings, p. 303.)

It should be said in this connection, in justice to Mr. Brandeis, that while Mr. Whipple was opposing counsel to Mr. Brandeis's firm in the bankruptcy case and in the Warren case, hereafter to be noticed, and declared Mr. Brandeis to have been in the wrong in both cases, he testifies that he believes there was no wrong motive on his part, but these wrongs resulted from mistakes and misunderstandings on the part of Mr. Brandeis. (Hearings, 284, 299.)

He sums up the Lennox case in this way:

You see, my belief was, at the time, that there was a misunderstanding. My belief was at the time, and now is, that Mr. Brandeis was misunderstood. That is, I preferred then, and prefer now, not on account of any personal friendship or feeling, but my view was that there was a misunderstanding. I think Mr. Brandeis was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he unconsciously overlooked the more human aspect of it, which would perhaps have appeared to another; but here was a man confronted with perplexities and charges and troubles, who wanted his personal and individual care and attention. But I think Mr. Brandeis looked upon it as a problem of distribution. (Hearings, p. 299.)

It should be said also in this connection that Mr. Whipple is a supporter of Mr. Brandeis and favors his confirmation. When his nomination was announced, Mr. Whipple gave out an interview in which he said:

As a lawyer, Mr. Brandeis is able and learned. As a man he is conscientious and high minded. The feature of his career which is the most striking and remarkable has been his unselfish and unswerving devotion to the social, moral, and industrial uplift of the lowly and less fortunate of our people. I believe that on the Supreme Bench of the United States he will exert a strong influence in establishing the ideals to which he has devoted his recent years. (Hearings, p. 282.)

The American Bar Association, of which, I believe, Mr. Brandeis is a member, promulgated certain canons of ethics, of which this is one:

#### ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.

It is a canon well worthy of consideration in this connection.

#### THE GLAVIS-BALLINGER CASE.

The charge in this instance is that Mr. Brandeis professed and held himself out as the attorney for Glavis and in effect acting in the public interest when he was the paid attorney of Collier's Weekly. This is claimed to have been such an impropriety as should prevent his confirmation.

There is but little dispute about the facts. Glavis, a clerk in the Interior Department, had made grave charges against his superior, Mr. Ballinger, the then Secretary of the Interior. Collier's Weekly published these charges. They were such as to subject the paper to a successful prosecution for libel, if not proved to be true. Collier's, in this emergency, employed Mr. Brandeis to represent it and paid him a fee of \$25,000 for his services. Admittedly he was employed to protect Collier's from liability on a libel charge and to this end to establish the truth of the Glavis charges. But Mr. Brandeis did not appear for Collier's but for Glavis, although Robert Collier was invited by the committee to appear and make any showing he might desire.

This is the appearance of Mr. Brandeis in the hearings as shown by the record:

Mr. GLAVIS. Mr. Chairman, I was here yesterday ready to proceed. I have brought my attorneys here, and I think that if they will be allowed to examine me that the testimony will proceed more rapidly.

The CHAIRMAN. Are you ready to proceed to testify?

Mr. GLAVIS. Yes, sir.

The CHAIRMAN. Very well. If the committee has no objection to that course, we will have your testimony taken and your attorney can examine you in chief.

Mr. McCALL. I understand that Mr. Louis D. Brandeis is your counsel.

Mr. BRANDEIS. I am counsel for Mr. Glavis with J. P. Cotton, jr., of New York.

The CHAIRMAN. Have you any statement that you desire to make before we proceed? (Hearings, p. 1072.)

J. P. Cotton, jr., as counsel with Mr. Brandeis for Mr. Glavis, was also employed by Collier's and represented it.

Mr. Mark Sullivan, now editor of Collier's and then associate editor, gave the committee the facts as he remembered them. (Hearings, p. 325.)

He states the object of Mr. Brandeis's employment by Collier's as follows:

Senator WORKS. Then you understood, Mr. Sullivan, that Mr. Brandeis was employed by Collier's Weekly to represent its interests and protect it?

Mr. SULLIVAN. Certainly. If, when the investigation began, Glavis had been discredited, if the investigation had shown nothing serious, Collier's Weekly was in position to be very much discredited.

Senator WORKS. Will you be good enough to answer the question?

Mr. SULLIVAN. Yes, surely; I meant to.

Senator WORKS. Read the question, Mr. Reporter.

The REPORTER (reading). "Then, you understand, Mr. Sullivan, that Mr. Brandeis was employed by Collier's Weekly to represent its interests and protect it?"

Mr. SULLIVAN. Largely, I should say, though I ought to remind you again that the editor of the paper then was Mr. Hapgood. I was not even present.

Senator WORKS. I was only asking for your understanding of it. That was your understanding?

Mr. SULLIVAN. Largely to protect the paper's interests, and largely for public service. (Hearings, p. 327.)

Mr. Sullivan testified that it was well known that Mr. Brandeis appeared for Collier's. As he put it, "Everybody knew it," at the time and qualified it by saying that he knew it and discussed it freely. That he shared the knowledge and that the "knowledge he had was general at the time." But he was quite unable to sustain this view by pointing out anyone to whom he had communicated that knowledge. (Hearings, pp. 326, 335.)

Subsequently he returned to the stand and named two persons to whom he had imparted his knowledge. (Hearings, p. 372.)

Mr. Norman Hapgood, then editor of Collier's also gave his views of this transaction. He gives very clearly what induced Collier's to employ Mr. Brandeis and for what he was being paid. On that subject he testified:

Senator WORKS. In the discussion of the matter, was the question raised at any time as to the probable liability of Collier's for the publication it had made?

Mr. HAPGOOD. It certainly was. There was an enormous liability of every kind—moral and financial. When we undertook to show that the Government was concealing such important facts, we were undertaking a good deal, but we did it with a very large sense of responsibility of every kind.

Senator WORKS. You understood perfectly that Collier's had a personal interest in the matter, in view of the fact that it might be held responsible in an action for libel for publishing a document of that kind?

Mr. HAPGOOD. We certainly did understand that. (Hearings, p. 459.)

Mr. Hapgood, like Mr. Sullivan, maintained that it was well known that Collier's Weekly was acting in the matter, but there is nothing to show that anybody, except maybe Collier's and their friends, had any knowledge that Mr. Brandeis was acting as the attorney of Collier's Weekly to protect its interests. Mr. Hapgood says there was a discussion as to "how the appearance was to be made" between him and Mr. Brandeis. He says:

*It seemed perfectly clear to us that if this was going to be kept a conservation movement against such big forces we must not try to get into the foreground; that Mr. Glavis, who was a Government official, as well as our contributor, should be the one person kept in front in order not to cloud the issue. (Hearings, p. 458.)*

This discloses a deliberate attempt to deceive the committee and the country by keeping Collier's in the background and Glavis in front in order to make it appear to be a "conservation movement" in the public interest and not a defense of Collier's against a threatened libel suit, which was beyond doubt what Collier's were paying for.

That this deception was deliberately intended and carried out is made clear by the testimony of Charles E. Kelley. Mr. Kelley was at the time the regular attorney of Collier's. (Hearings, p. 388.)

He acted with and assisted Mr. Brandeis in the Glavis matter on the outside. He recounts what occurred between him and Mr. Brandeis as follows:

Mr. Fox. Were you thereafter in Washington with Mr. Brandeis while he was acting in the matter of the Ballinger-Pinchot-Glavis investigation?

Mr. KELLEY. Yes, sir; I was.

Mr. Fox. Did you have any conversation with him on the subject of your appearing with him in the matter before the committee?

Mr. KELLEY. I did.

Mr. Fox. Will you please state what Mr. Brandeis said in that regard—what you said to him and what he said to you—giving, of course, the substance?

Mr. KELLEY. I would not undertake to state more than the general substance, because the conversations extended over many days. The substance of the conversations on Mr. Brandeis's part was that he did not care to have me appear with him before the committee, and he also stated in those conversations the reasons for that request.

Mr. Fox. Will you give the reasons, please, and what he said?

Mr. KELLEY. He stated in substance that he was going to appear or was appearing—because the conversations extended over some time—before the committee as attorney for Mr. Glavis.

\* \* \* \* \*

Senator CUMMINS. In your discussion with Mr. Brandeis with respect to appearance was it understood that the relation of Mr. Brandeis to Collier's could not be made known?

Mr. KELLEY. Really, sir, I doubt my ability to testify as to what was understood. I might venture what the understanding was between Mr. Brandeis and myself, but I would not care to go further than that.

Senator CUMMINS. That is precisely what I asked you.

Mr. KELLEY. As between Mr. Brandeis and myself, I think I would have to say that was the understanding.

Senator CUMMINS. What reason did Mr. Brandeis give, if any, for desiring that course to be pursued?

Mr. KELLEY. That was a subject of conversation between Mr. Brandeis and myself on many occasions with a view of deciding what was the best policy in so far as the prosecution of the charges, if I may put it that way, was concerned. I do not think I could state at this date that there was any further reason than one of policy. (Hearings, pp. 389, 392, 398.)

This shows the intent and purpose of Mr. Brandeis to conceal the fact that while he appeared of record as the attorney for a public official in the cause of conservation he was in fact appearing for and



being paid for appearing for and in the interest of private individuals to protect them from personal liability.

Mr. Kelley also testified to the fact that prior to the commencement of the hearings, Collier's were invited to appear and present evidence. (Hearings, p. 399.)

I have examined with some care the proceedings before the Glavis-Ballinger committee and Mr. Brandeis's course in that hearing, and the manner of his treatment of the committee and the witnesses tends to show the nature of his employment. It does not seem to me to have been the course of a public spirited citizen seeking to forward the "conservation movement" in the public interest.

I think it is very generally regarded by the profession as an impropriety for an attorney to appear as the attorney for one person when he is employed and paid by another person not a party to the action or proceeding to represent his interests. This seems to me to be an aggravated case of that kind involving the intention and the effort to conceal the true character of the employment. It is made worse, in my estimation, by the fact that the great question of conservation and the conduct of a public official in dealing with that subject was of record and supposed to be in fact the matter under investigation and in the public interest. The element of private interest and the effort to protect a private individual from personal liability was a false issue which was purposely concealed.

Mr. Hapgood, like Mr. Sullivan, declared that it was well known that Collier's Weekly was interested in the investigation. But there is no evidence to show that anyone knew that Mr. Brandeis was employed and paid by Collier's to protect their private interests. Not only so but it is shown that Mr. Brandeis himself concealed or tried to conceal that important fact.

As to the course of Collier's Weekly, Mr. Hapgood testified:

Senator WORKS. Did Collier's Weekly publish the facts respecting this investigation as it passed along?

Mr. HAPGOOD. Yes, sir.

Senator WORKS. Was anything said in Collier's about Mr. Brandeis appearing for Collier's or being paid by Collier's during that time?

Mr. HAPGOOD. At one time a newspaper which was actively supporting the administration attacked us along various lines, including the statement that we were paying Glavis's lawyer. I wrote a short and rather satirical editorial, merely saying that we certainly were, and we would support any other contributor who got into trouble of that kind through us.

Senator WORKS. Can you give us a reference to that editorial so that it can be reached?

Mr. HAPGOOD. I can to-morrow or this afternoon.

Senator WORKS. I did not expect you to do it now, but if you will furnish us with a copy of it I shall be very glad. (Hearings, p. 458.)

The letter was subsequently produced. (Hearings, p. 706.)

It does not disclose the fact that Mr. Brandeis was appearing for or being paid by Collier's. It assumes that it is legally protecting its contributor when in fact, as the evidence of both Mr. Sullivan and Mr. Hapgood shows, that Mr. Brandeis was employed and paid to protect Collier's Weekly and not Mr. Glavis. How it was legally protecting its contributor is not disclosed. But this letter is important as showing the intolerant, uncompromising, not to say bitter and malignant spirit that was being represented and served by Mr. Brandeis in a hearing where he was ostensibly appearing with the commendable purpose of arriving at the truth concerning a matter

of public interest and concern. That he and his clients should attempt to conceal the fact is not to be wondered at. The letter accentuates and makes clearer, if possible, the grave impropriety of the whole proceeding.

It must be taken as true, therefore, that Collier's Weekly as well as Mr. Brandeis was concealing the fact that Mr. Brandeis was appearing for or representing it.

The testimony of Mr. Sullivan shows that for his services for Collier's Weekly he was paid by it the sum of \$25,000. (Hearings, p. 386.)

Mr. Storey very well said in his testimony:

If Mr. Brandeis had come before the committee and said he was there in the interests of an illustrated newspaper that was engaged in pushing this case all the way through, he would have occupied a very different position from that which he apparently occupied when he appeared for a man without means to conduct a great public inquiry. (Hearings, p. 269.)

I call attention in this connection to this further canon of the American Bar Association:

#### PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS.

A lawyer openly, and in his true character, may render professional services before legislative or other bodies regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of government, upon the same principle of ethics, which justify his appearance before the courts; *but it is unprofessional for a lawyer so engaged to conceal his attorneyship*, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

#### THE WARREN CASE.

S. D. Warren died May 2, 1888, leaving property consisting mainly of book paper manufacturing mills of the value of something like \$2,000,000. He disposed of the property by will, five-fifteenths to his widow and two-fifteenths to each of his five children. He had a partner, Mortimer B. Mason, in the paper business, whose interest was limited. He was, under the partnership, allowed to draw out of the firm only \$15,000 a year, and his interest was terminated at the death of Warren.

The year Mr. Warren died the property yielded a profit of \$460,000, and the business had yielded the year prior over \$400,000, and had been up considerably above a quarter of a million, and all the time, I think, above \$300,000 for eight years preceding. (Testimony of Youngman, hearings, p. 463.)

Mr. Warren left a widow, Susan C. Warren, and five children—S. D. Warren, jr., Fiske Warren, Edward P. Warren, Henry Warren, and Cornelia I. Warren. The oldest child, S. D. Warren, jr., was a lawyer and the partner of Mr. Brandeis. All of the heirs joined in a bill of sale of the personal property connected with the mills to S. D. Warren, M. B. Mason, and Fiske Warren—one-third to S. D. Warren, one-half to Mason, and one-sixth to Fiske Warren as partners. (Hearings, p. 548.)

Then by conveyance, through John E. Warren, they conveyed the mill property to Susan C. Warren, S. D. Warren, and M. B. Mason in trust. The declaration of trust provides:

Second. The trustees shall themselves manage and conduct the business of said mills and the other property at any time held in trust, with full powers to do all things needful or proper in the conduct thereof, or, in their discretion, they may lease said

property or any part thereof; and they are hereby empowered to lease the same, or any part thereof, among others, to a partnership or organization in which they themselves, or some of them, are partners or members, or to some person or persons who shall sublease or assign the lease to such a partnership or organization, on such terms as may be proper for the interests of all the beneficiaries. (Hearings, pp. 549, 550.)

It was also provided that the trust should continue for 33 years, but that the trustees might terminate it at their sole discretion and put an end to the trust and reconvey the property. (Hearings, p. 551.)

No option to terminate the trust was given to the beneficiaries of the trust. So if the business under a lease that was undoubtedly then in contemplation should prove profitable the trust might continue to the end of the 33 years; if not, the property could be thrown back upon the heirs of the estate.

The declaration of trust was executed May 29, 1889, and was signed by the three trustees only.

On the following day the trustees executed a lease of the property to Louis D. Brandeis. (Hearings, p. 553.)

The lease provided:

To have and to hold the said premises hereby leased unto the said Brandeis and his representatives at the will of the lessors, but subject to be determined by a one year's notice in writing, no shorter notice being allowed except for default of the said Brandeis on his covenants as hereinafter provided.

Yielding and paying therefor (except only in case of fire and other casualties hereinafter mentioned) yearly as rent a sum equal to the interest at 6 per cent per annum on the value of the premises hereby leased, as they appear in the books of the said trustees at any time (the said part rental for any year or for any period to which the account is made up being the balance of the interest account kept with said properties hereby leased on the books of the trustees after all debits and credits are made), plus a sum equivalent to 50 per cent of the net profits made by the use of the property hereby leased, after allowing a reasonable per cent as commission and guaranty on sales (over and above the interest at 6 per cent hereinbefore provided for).

It is hereby understood and agreed that the said Brandeis may assign this lease and the interest thereunder to a copartnership consisting of Samuel D. Warren, Mortimer B. Mason, and Fiske Warren, to conduct the business heretofore carried on under the name of S. D. Warren & Co., under the same name. (Hearings, p. 553.)

It is quite evident that these several instruments were executed in pursuance of a previous understanding that this lease should finally be made. Whether the exact terms of the trust and of the lease, neither of which was signed by the heirs of the estate, were understood and agreed upon, the evidence does not disclose.

In pursuance of the authority given in the lease to him, Mr. Brandeis assigned the same to S. D. Warren, M. B. Mason, and Fiske Warren, who took possession of the mills and operated them for many years under the lease.

Subsequently Edward P. Warren became dissatisfied with the transaction and the operation of the mills and brought his action December 19, 1909, against the lessees for an accounting. (Hearings, p. 894.)

The substance of the bill, so far as it affects the question before the committee, is that S. D. Warren and Mr. Brandeis, his partner, devised a scheme for placing the property in trust and for leasing the same to Mr. Warren and others; that Warren's interests under the lease, as he knew, would come in conflict with the other heirs; that in furtherance of the scheme Warren also procured from his brother Edward, plaintiff in the action, a general power of attorney to represent him; that the interests of the beneficiaries under the trust were

not properly protected under the trust; that Warren violated his duty as such trustee and committed many breaches of trust, which are enumerated. Amongst other things, it is alleged:

The plaintiff says that the said trustees, acting under the advice and direction of the said Samuel D. Warren, overlooked the fact that it was their duty to have the advice of an independent attorney owing no duty to any persons having interests adverse to those of the beneficiaries represented by the trustees and employ constantly the same attorney who was employed by the lessees, namely, the business associate and legal adviser of said Samuel D. Warren, Louis D. Brandeis, Esq., and the law firm of which he was the principal member. That said trustees have paid to the said Louis D. Brandeis and to his law firm during the period from 1889 down to the present time upward of \$40,000 out of the assets of said trust, and during the said period the said lessees have paid a like amount for services rendered to the copartnership consisting of the same Samuel D. Warren and Mortimer B. Mason, trustees as aforesaid, the other copartner, Fiske Warren, having only a small interest.

And, again:

In preparing said lease said trustees, under the guidance and direction of the defendant, Samuel D. Warren, having regard chiefly to the personal interests of the said Samuel D. Warren and his copartnership and disregarding the interests of the beneficiaries under said trust, provided that said copartnership should be entitled to receive out of the gross income of the business a commission which should be deducted before arriving at the net profits. Said commission and net profits received by the said Samuel D. Warren and the said Mortimer B. Mason as copartners as aforesaid during the first five years after the creation of the trust, to wit, from 1889 to 1894, amounted to upward of \$900,000. The commission alone of said partnership during the period from 1889 down to the present time has amounted to upward of \$1,200,000, being an amount entirely disproportionate to any services rendered by said copartnership, or by any member thereof in view of the other sums received by said copartnership and its members in the way of profits and otherwise from the gross income of the business. (Hearings, p. 896.)

And further:

The plaintiff says that equity considers the substance of matters and not their form. That the scheme planned by the defendant, Samuel D. Warren, and adopted under his guidance was in substance that the property should be managed and the business carried on by himself and in his cotrustee, Mortimer B. Mason, for the benefit of the widow and children of Samuel Dennis Warren. That under this arrangement it was not permissible that the said Samuel D. Warren and the said Mortimer B. Mason to take for their own services more than a reasonable compensation. That as a matter of fact they have taken as such compensation upward of \$2,024,700, being \$1,024,700 more than can be considered reasonable in any aspect of the case. That the taking of this excessive amount amounted to a very serious breach of trust. That the plaintiff is informed and believes that the said Samuel D. Warren, his copartner, Mortimer B. Mason, having been incapacitated by reason of his illness aforesaid, resulting in his death during the current year as aforesaid, has planned to take out of the business in the way of commissions and profits (in addition to his share as a beneficiary) upward of \$100,000 for the year ending December 31, 1909, and will take said sum or a larger amount at the end of the year 1909 unless prevented from so doing by this court. (Hearings, p. 898.)

There were other allegations of breaches of the trust, but those set out will suffice to show what was the nature of the action.

The case went to trial but before the end of the trial it was compromised by the heirs of S. D. Warren, who had died in the meantime, and others, paying Edward P. Warren, the plaintiff, a large sum of money and taking over his interest in the property and the business.

During all the time after the death of S. D. Warren, sr., until Edward P. Warren brought his action or was preparing to bring it, Mr. Brandeis was the attorney for and representing all the interests concerned including the settlement of the Warren estate, the trustees under the trust, the lessors, and the lessees under the lease, and,

as included in these, the interests of all the heirs of the estate and was paid for the services rendered by him for each and all of them and that his firm had received \$40,000 for services to the trustees and a like amount from the lessees of said trustees as charged in the bill of complaint. It is not necessary to go into the details of the charges made in this respect. There is no evidence to show that there was any corrupt conspiracy between Mr. Brandeis and his partner, S. D. Warren, to defraud or take any undue advantage of the other heirs of the estate. It was agreed at the hearings, by all parties concerned, that Mr. Warren was a highly honorable and trustworthy man as well as an able lawyer. It does not seem reasonable that such a man would knowingly enter into any scheme to injure his brothers and sisters.

There is no doubt that the lease was very favorable to the lessees but it is only fair to presume, in the absence of evidence to the contrary, that both Mr. Warren and Mr. Brandeis, in good faith, believed the terms of the lease to be justifiable under the circumstances. This leaves the question of the right or the propriety of an attorney representing two wholly adverse and conflicting interests at the same time under retainer and pay of both.

This raises a question about which there may very reasonably be differences of opinion. Mr. Storey, who testified against Mr. Brandeis, did not think it was wrong, and said he might have done the same thing. (Hearings, p. 279.)

But when asked whether it was not the common practice for a lawyer who had the confidence of all the parties to undertake to represent all of them although, eventually, the interests may be disclosed to be in a sense conflicting, he said, "I think it is a common practice but I think a bad practice." (Hearings, p. 279.)

Afterwards Mr. Storey explained and limited this statement by letter.

Mr. Whipple took the position that Mr. Brandeis was "possibly careless in not making very, very clear to Mr. Edward Warren just the whole transaction and its possible effect upon his rights." (Hearings, p. 284.)

His full statement on the subject I have already given.

Mr. Baily and Mr. Youngman, who represented Mr. Edward Warren in the litigation, both regarded the course taken by Mr. Brandeis as absolutely wrong. (Hearings, pp. 138, 141, 471, 474.)

And Mr. Youngman testified that Mr. Storey was not present except one day during the trial; was only nominally an attorney in the case for Fiske Warren, who was not actually contesting the case one way or the other.

All of these gentlemen are capable and honorable members of the profession. The one thing that appeals to me as the most serious question of not only propriety, but of legal right, is the fact that when a conflict did arise between the parties whom he had up to that time represented and a suit was brought by one of them against the other, Mr. Brandeis should accept employment for one of his former clients against the other. The detailed information that he must have acquired from his long connection with the whole matter from the beginning to the end gave him an immense advantage over opposing counsel. Besides this, his confidential relations with Edward Warren, evidenced by correspondence that had taken place

between them as attorney and client, regarding the matters in litigation, should, it seems to me, have excluded him from any participation in the controversy. Up to the time of making the lease I see no serious ground of complaint of Mr. Brandeis's course. When the lease was made the interests of the parties became antagonistic, and they could not be properly and legitimately served by the same attorney. It was complained that he neglected his duty to Edward Warren by not keeping him fully informed of what was going on and of his rights.

It is not unusual for attorneys to advise a whole family respecting their business affairs when there is no disagreement between them. I think, as Mr. Storey said, it is a bad practice, that may bring an attorney, however conscientious he may be, into an unfortunate and awkward situation and arouse criticism. That was just what happened in this instance, and when it happened the only true course to take was to decline, as soon as the difference arose between his clients, to represent either of them. The failure of Mr. Brandeis to take this course was the gravest mistake he made.

It appears from the testimony of Mr. McClennen, Mr. Brandeis's partner, that for 21 years their firm drew an annual salary from the trustees under the trust, and the lessees from them whose interests were, of course, in direct conflict. The salary was \$5,000 a year for part of the time, and then \$4,000, amounting in the aggregate to something like \$90,000, and was divided between the two. (Hearings, p. 1258.)

This continued up to the time when Edward P. Warren brought his suit, when the firm took the side of one of the interests, by which it had been employed and paid, against one of the beneficiaries under the other, by which it had also been employed and paid.

The real controversy was between one of the beneficiaries under the trust and heir to the estate, also represented by the firm, against the lessees, but if it had been between the beneficiary and the trustees the appearance by Mr. Brandeis would have been equally objectionable.

I can not see how this course of conduct can be justified or excused.

#### THE ILLINOIS CENTRAL RAILROAD CASE.

A contest was on between Stuyvesant Fish and E. W. Harriman involving the election of a board of directors for the Illinois Central Railroad and the control of the road. They were each making strenuous efforts to secure enough proxies from stockholders to control the situation. Waddill Catchings, representing the Harriman interests, employed the firm of Mr. Brandeis to aid him in securing such proxies. It seems to have been understood that Mr. Nutter, of the firm, should have charge of the work. But Mr. Brandeis was consulted with in the beginning and approved of the employment of the firm for that purpose, was fully advised in the matter, and consented that the firm act in that capacity. (Catchings's testimony, hearings, pp. 396, 342.)

The nature of the employment and the work done is fully explained by Mr. Catchings. (Hearings, p. 342.)

He testified that the sole connection of Mr. Brandeis was to give his approval to the employment of the firm. (Hearings, p. 343.)

But this appears to be a mistake.

Mr. Francis Peabody testified that a young lawyer came to him to get his proxy; that he told him he had already given it to Mr. Fish, and that he did not approve of the effort to remove Mr. Fish and that he replied:

"Well, Mr. Brandeis says that he is a personal friend of yours," which was true, "and he asked me to say to you that he would like to have you give a proxy," which would have the effect of revoking my former proxy, in the Harriman interests, and that if you are unwilling to do so he personally will come over and see you." I said, "My mind is quite made up about it." He said, "Mr. Brandeis told me to say to you that he would like to come over and see you about it; and may I use your telephone?" I said, "Yes; you can use my telephone, but it is perfectly useless; nothing I am quite certain, that Mr. Brandeis could tell me in the way of argument would induce me to change my proxy, as I have implicit faith in Mr. Fish." (Hearings, p. 750.)

So it seems that Mr. Brandeis was taking part actively in the hunt for Harriman votes.

In another matter that will be taken up later Mr. Joseph B. Warner accused Mr. Brandeis of having represented Mr. Harriman as his attorney. In the so-called Merger case Mr. Warner said:

That was the situation when this report was made. Since that they have done a good deal more. They have acquired the Illinois Central Railroad, the control of it, he has, and I suppose nobody could tell us more definitely about that than the attorney who is managing the antimortgage cause, for I understand that it was he who solicited for Mr. Harriman the proxies which enabled him to get the control of the Illinois Central Railroad, so far as Massachusetts stockholders were concerned. So we have the interesting spectacle of the same gentleman declaiming against monopoly in the afternoon and evening, and declaring for it in the morning, in both cases, I assume, without pay, but in each case addressing the people of Massachusetts. (Hearings, p. 635.)

From the manner in which the subject was treated by both Mr. Warner and Mr. Brandeis it must have been regarded as discreditable to have accepted such employment. At all events Mr. Brandeis wrote a letter denying the imputation, in which he said:

Mr. Warner said, in effect, that I was acting and had acted as counsel for Mr. Harriman. That statement is absolutely untrue in every respect. I have never acted, directly or indirectly, for Mr. Harriman or communicated directly or indirectly with him, or with anyone who represented him directly or indirectly; nor have I acted, so far as I know, directly or indirectly for any company with which Mr. Harriman has ever been connected. No one connected with my firm has ever acted directly or indirectly for Mr. Harriman or for any company with which Mr. Harriman was connected, except as follows:

On November 22, 1907, a representative of the firm of Sullivan & Cromwell, of New York, for whom we have acted from time to time for nearly 15 years, requested my partner, Mr. Nutter, to aid him in connection with obtaining proxies for the annual meeting of the Illinois Central. Mr. Nutter, in the presence of Sullivan & Cromwell's representative, asked me on that day whether there was anything in my merger fight which should prevent his acting in that matter, and I told him none whatever; that so far as I knew, Mr. Harriman had no interest of any kind in the merger question.

Mr. Nutter did act for Messrs. Sullivan & Cromwell, and either he or persons employed by him solicited in the most open manner, during the course of several months, proxies, applying among others to many gentlemen who were known to be most actively in favor of the merger.

If the judgment of Mr. Warner and his associates were not entirely obscured by prejudice so as to quite overcrowd their reason, they would have found, in the fact that Mr. Nutter did act most publicly in the matter of soliciting proxies for the Illinois Central meeting, the strongest evidence that in this merger matter I could by no possibility be representing Mr. Harriman, rather than the reverse. (Hearings, p. 352.)

Disconnected with other matters to be considered later, this is the case made in this instance. There might be some question of the

propriety of a firm of lawyers accepting employment of that kind, but it seems to me to be rather a question of taste. The other issue is one of veracity.

#### WRECKING THE NEW ENGLAND ROAD.

The charge is made that the New Haven Road undertook to destroy the New England Road as a competitor and finally succeeded. That Mr. Brandeis was instrumental in bringing about that result and brought a number of suits in different States in the effort to carry out that purpose. Mr. Brandeis's part in it, if that was the object of the suits, is thus stated by Mr. Moorfield Storey, who was then the attorney for the New England Road:

Mr. Brandeis, acting apparently or ostensibly for one N. F. Goldsmith and his partner, Mr. Keith, and one, Mr. Lotham, brought a series of bills, 10 in number, in Boston, in Rhode Island, and in Connecticut, aimed to paralyze the financial operations of the New England Railroad. One suit was brought for the purpose of preventing the payment of the dividends of the preferred stock; another was brought to prevent the issue of mortgage bonds. The New England Railroad had bonds which were paying 5 or 6 per cent, and 6 or 7 per cent, and they desired to refund, and one of their purposes was to issue more bonds. Another suit was brought to attack their leases of certain branch lines, and, in all, 10 suits were brought.

In the spring of 1893 the Legislature of Massachusetts, first at the instance of certain dealers in produce, and afterwards giving the investigation a broader scope, appointed a committee to consider what the relations between these two railroads were, and I conducted the hearing. Mr. Brandeis testified that he was the main counsel; that the other counsel had acted under his direction. He testified that Messrs. Arling, Webb, and Moorehouse, Connecticut lawyers, were acting under his direction, and that the bills they brought were drawn in his office, and that he was the counsel in charge. He said that scarcely a day passed for six months that he had not had something to do with those suits. The result of it was that the credit of the New England Railroad was destroyed; its financial operations were impaired, and its sources of revenue were cut off, except so far as they came from earnings; and, in the fall of 1893, the corporation went into the hands of a receiver, from which it emerged as a part of the New Haven Railroad. At the investigation I undertook to find out for whom Mr. Brandeis was acting, and he finally said that his client was Goldsmith. I asked who paid the bills, whereupon he declined to answer, saying that was a privileged question. I suggested that it perhaps was not and he cited some authorities and stated he would consider it. That occurred on one day and the next day he was away from Massachusetts, as he testified—I think in New York—and the third day he came back and told us. He began by saying that "While I am perfectly willing to give this information to the committee, I want it to be agreed by Mr. Storey that it shall not be given out in any other investigation." Here was his statement:

"We are willing to give the information to the public so far as the public needs it, or the legislature needs it, but we are not willing to be compelled before this tribunal to give testimony which will prejudice our case in court."

He wanted me to sign a written agreement that the testimony he gave there should not be used in these cases. But after I pointed out that I could not very well see how any legitimate statement as to his clients would prejudice his case he decided on the whole that he would not insist upon it. Thereupon it turned out that Mr. Goldsmith was the owner of about 60 shares of stock, worth at that time about \$3,000, and by no means in a position to incur the expense of six months' employment of counsel in Massachusetts, in Connecticut, and in Rhode Island in the bringing of 10 suits. The bills which were brought forward were bills brought in the name of Goldsmith and such other stockholders as should see fit to join. They stood before the court and were pressing their suits brought by the stockholders in their own interests to prevent transactions which were pending and threatening to injure the value of their stock. It was perfectly apparent. It turned out on examination that a man named Judge Kelly, from New York, had come on there and consulted Mr. Carling (?), who was president of the Magee Finance Co., and they had employed Brandeis. The question arose as to whose name the suit should be brought in, and Mr. Carling ran over the list of stockholders, and they finally applied to somebody, whose name was not disclosed, who



refused to allow his name to be used. Then it was that Mr. Goldsmith, a liquor dealer, of Boston, was applied to, and apparently they promised him a considerable sum of money for the use of his name. His name was accordingly used. When I asked Mr. Brandeis who was his client, he gave the name of Goldsmith and also gave the name Coburn. When I asked if he ever made any charge to those people on his books, he said no. I asked him to whom he did make his charges and he said he made them to Kelly, or they were paid through Kelly.

Senator CHILTON. Who was Kelly?

Mr. STOREY. The lawyer who came on from New York representing somebody.

Mr. ANDERSON. Now one of the supreme court judges of New York.

Mr. STOREY. Yes; at that time acting as counsel.

Senator WALSH. Representing whom?

Mr. STOREY. His name was William J. Kelly, I think.

In the fall of 1892 apparently, as the correspondence which I have seen shows, Mr. Kelly seemed to lose his interest in the suit, and Messrs. Arling, Webb & Moorhouse after writing to him, applied directly to the New Haven road for instructions, and from that time on the litigation was carried on by them. In the course of that litigation it became necessary that a bond should be given to indemnify the defendants where an injunction was to be issued to prevent the registration of certain bonds. The bond was in the sum of \$25,000. The New Haven road furnished security, and Mr. Coburn gave the bond, and the security was signed by Messrs. Tuttle—afterwards president—Charles P. Clark, president, and Mr. J. Pierpont Morgan, and Mr. William Rockefeller. From that time on the suits were carried on, not resulting in any hearings, because the company went into the hands of a receiver before the cases came on for hearing. (Hearings, p. 264.)

He says further on this subject:

It is apparent to me that it was clear to Mr. Brandeis that these ostensible parties were not his clients. He never regarded them as such. He never made any charge to them. He took his directions entirely from somebody representing an outside person. That outside person may have been Coburn or may have been the New Haven Railroad. In any event, it was not the somebody who was the ostensible party he was representing. That somebody was either interested in the New England road or he was not. If he was interested in the New England Railroad, there was no earthly reason why his name should not be used in those suits. If he was not interested in the New England Railroad, then it was clear that some outside influence, some outside person, for a reason unwilling to disclose himself or itself, was working to injure the New England Railroad and working effectively, industriously, persistently. (Hearings, p. 266.)

And again:

It appeared afterwards and appeared at the trial of the New Haven directors that this agreement, of which I have spoken as made, and I have seen this week that the New Haven Railroad paid Moore, Webb & Arling something like \$27,000 for services and expenses in the suit, and that after Mr. Corbin's death and Mr. Goldsmith's death the administrators of the Goldsmith estate brought suit against the Corbin estate, alleging that he had been promised a large and liberal compensation for the use of his name and the New Haven Railroad settled that case by the payment of \$10,000.

It was further shown that in the actions lately brought by the Government against the directors of the New Haven road, one of the charges made was that the Goldsmith suits were brought in the interest of the New Haven road for the purpose of destroying its competitor, the New England Railroad. (Hearings, p. 267.)

Mr. Storey summed up his views on the subject as follows:

In the New England case you have the facts that the suits were calculated to wreck the New England, that they had that effect, that they were paid for by the New Haven; that the ostensible parties were not the real parties, and that Mr. Brandeis was unwilling to disclose who the real parties were. (Hearings, p. 270.)

Extracts from the petition and other proceedings in the United States *v.* New Haven & Hartford Railroad Co. and the criminal action against William Rockefeller et al. were introduced in evidence at the hearings.

They show the prominence that was given to the charges above referred to, including the bringing of the Goldsmith suits as means of wrecking the New England road. (Hearings, pp. 415, 420.)

In the Rockefeller case Mr. Batts, one of the counsel, thus characterized the efforts of the New Haven to destroy its competitor:

There is also no question that while that competitive condition existed, and by methods that are so very wrong, so entirely without the range of decency and legality, that under the improved morals brought about by the several acts passed by the Congress of the United States, they would not even be thought of at the present time by men engaged even in the railroad business. There is this, at least, to be said about the New England: If these methods had not been pursued, and the New England Railroad had been permitted to do the financing with these suits that Mr. Rockefeller and Mr. Morgan helped to maintain, and by that word "maintain" I am now using it in a sense which indicates an illegal maintenance—if, I say, the New England road had not been subjected to these illegal, immoral influences, there is at least the possibility at this time that there would have been two active competitors, two efficient roads, serving the people of New York and the people of Boston in matters of passenger service and everything else.

Mr. Brandeis's testimony before the committee of the Massachusetts Legislature regarding this transaction will also be found in the record. (Hearings, p. 421 and on.)

The testimony is very long and can not be inserted here. It deserves the careful attention of the committee as giving fully Mr. Brandeis's account of his connection with the Goldsmith suits. That the New Haven finally took over these suits and became liable for all expenses in connection with them and gave a required bond of \$25,000 is clearly shown. The suits, while brought in the name of Goldsmith and others, were in fact instigated and carried on at the expense of one Austin C. Corbin, who obligated himself to pay all of the expenses of the litigation, as I shall presently show. Who Corbin acted for in the beginning is not shown, but that the New Haven finally took his place and made itself responsible for the further prosecutions and management of the cases can not be doubted.

The following correspondence used as exhibits in the Government suits discloses this:

NEW YORK, *January 23, 1893.*

TO AUSTIN C. CORBIN,  
*New York:*

We are informed that there is a proceeding or suit in Connecticut, wherein one H. L. Knowlton and N. F. Goldsmith & Co. are plaintiffs, in which it is sought to enjoin the comptroller from registering \$2,000,000 of bonds of the New York & New England Railroad Co., and the court will enjoin the registry until the case is decided, on condition that a bond for \$25,000 is given to cover any costs or damages that may be awarded to the defendants by reason of the granting of such injunction. We desire to have such bond given, and if you will procure it to be furnished, we agree to pay any costs or damages that may be awarded and will indemnify and save you harmless from all loss by reason of such litigation, we being consulted as to its management.

LUCIUS TUTTLE.  
WILLIAM ROCKEFELLER.  
J. PIERPONT MORGAN.  
CHAS. P. CLARK.

(1630, 1631.)

APRIL 12, 1898.

J. PIERPONT MORGAN, Esq.,  
Post Office Box 3036, New York.

MY DEAR MR. MORGAN: Acknowledging your favor of the 11th instant, I beg to assure you that you need pay no attention to the Corbin suit, as we will assume all care and responsibility in that matter, and it is now in the hands of our counsel, who will give it all the attention the case demands. I am very glad to know of your safe return and good health.

Yours, sincerely,

JOHN M. HALL, *Vice President.*

JULY 8, 1898.

HON. LYNDE HARRISON,  
New Haven, Conn.

MY DEAR JUDGE: Referring to your favor of the 5th instant, I beg leave to say that I will endeavor to obtain from Mr. Kochersperger a statement of the dates and the amounts paid by our company on account of the Goldsmith matter, etc., very soon. \* \* \*

JOHN M. HALL, *Vice President.*

NOVEMBER 29, 1898.

HON. LYNDE HARRISON,  
New Haven, Conn.

DEAR JUDGE: Answering yours 19th, regarding expenses in the Goldsmith litigation, I would say that Mr. Kochersperger has finally picked them out and the aggregate is \$7,074.73.

Yours, truly,

JOHN M. HALL, *Vice President.*

AUGUST 4, 1898.

MR. WILLIAM ROCKEFELLER,  
26 Broadway, New York.

MY DEAR MR. ROCKEFELLER: Your statement of purchases and sales of N. H. & N. E. stock was duly received. Please find check herewith to balance that account, and also accept the thanks of the company for the financial assistance rendered by you in bringing this important matter to a successful conclusion.

Time alone can determine the financial benefit accruing to our company by the acquisition of the New England road, which we all agree never should have been built. I am confident any benefits to be derived from its possession will be chiefly the prevention of competition rather than from its operation.

I am clear, however, that the greatest possible economies ought to be exercised in the management of that property in connection with our own and that such a policy will alone prevent the New England Railroad becoming a very serious burden to us. \* \* \*

Yours, very truly,

JOHN M. HALL, *Vice President.*

(1633-1640.)

WILLIAM ROCKEFELLER, Esq.,  
26 Broadway, New York.

DEAR SIR: \* \* \* There is no reason whatever why Harrison should have troubled you with this matter, and if you will kindly refer him direct to me, I will endeavor to see that this matter is properly disposed of, when it can be done on a fair basis. The claim of these parties is simply a blackmailing scheme, got up after Mr. Corbin's death, to secure money from Mr. Corbin's estate, and incidentally from us, to such extent as we guaranteed Mr. Corbin for disbursements and services in the old suit of Goldsmith against the New England Railroad Co., which was proceeded with to stop the issuance of additional funds of the New England Railroad Co., and which resulted in preventing the New England Railroad Co. from issuing the large number of bonds which we, as purchasers of the New England Railroad Co., would have had to assume if they had succeeded in issuing them. Whatever we pay in settling this suit, even if it amounts to the whole demand, would be justified on account of the benefits secured by the suit in question. \* \* \*

Yours, very truly,

JOHN M. HALL.

The blackmailing scheme referred to by Mr. Hall evidently refers to an action brought by the estate of Goldsmith against the estate of Corbin to recover advances made by the former to carry on the suits, which will be further noticed presently.

We have then the testimony of Hon. William J. Kelly, then a practicing lawyer, now a judge of the Superior Court of New York. (Hearings, p. 403.)

Judge Kelly was employed by Corbin. For some reason Corbin did not want to bring the suits in his own name. So he, assisted by Judge Kelly, secured Goldsmith and others to bring them, Corbin obligating himself to pay all expenses and protect Goldsmith from liability. Corbin had been a member of the board of directors and president of the New England road. Judge Kelly says, after reciting the difficulties and dissensions between Corbin and other members of the board of directors:

Mr. Corbin was a very positive man in his ways; he was very much provoked and annoyed; and when he got out of the New England Railroad he said there was only one thing he should do, in view of the condition of the road and in view of the fact that the directors in the road had used their position, and were using it, for the purpose of benefitting themselves at the expense of the road; that there was only one thing to do, and that was to bring proceedings to put the road into the hands of a receiver for the protection of the stockholders and the second-mortgage bondholders. That is when he came to me about these litigations. That is when I saw Mr. Brandeis first. I went to Boston and I saw Mr. Brandeis, and employed him to assist me in the matter. Bills of complaint were drawn in Massachusetts and Connecticut and New York, to put this road in the hands of a receiver, in which the charges to which I refer were set forth in detail; the fact that the road was insolvent; that its operating expenses exceeded its earnings long before these suits were started. (Hearings, p. 405.)

So the avowed purpose for which Mr. Brandeis was employed was to put the road in the hands of a receiver, which, under the circumstances, was to wreck it. This being so, it was not surprising that Corbin, who was a man of wealth and influence, should want to conceal his part in it and hide behind a small stockholder.

Their first step was to prevent the company from paying dividends or issuing bonds. The litigation was kept on foot until in 1894 a mortgage was foreclosed, when, as Judge Kelly says, "the Goldsmith litigations and all these various Corbin litigations ceased." (Hearings, p. 405.)

Evidently they had served their purpose. Corbin had turned the cases over to the New Haven road, that road guaranteeing the payment of all expenses.

When asked whether, at the time, there was any scheme on foot on the part of the New Haven to wreck the New York & New England, Judge Kelly said:

I do not know anything about it, sir. I had nothing to do with the New Haven Railroad at all at the time of the beginning of these litigations; absolutely nothing to do with it. Mr. Corbin's position was antagonistic to them at that time. He had expected to carry on the New England Railroad, sir. It was long after that that the New Haven road had anything to do with these litigations. The end of 1893 or 1894 was the first time they had any connection with these litigations, and that was when the foreclosure suit was pending or imminent, when these litigations were of no service to anybody. (Hearings, p. 406.)

He also says that Mr. Brandeis was not employed to wreck the New England Railroad and that "the reason he was employed was to show that the New England Railroad was wrecked at that time and to prevent the further distribution of the corporate assets among

certain of the directors," which would amount to practically the same thing in the interest of the New Haven road and accomplished the desired result as above set out. The New England road was wrecked and it was taken over by the New Haven. The preliminary proceedings involving temporary injunctions tying up the activities of the road were successful, and when this was accomplished the litigation was no longer pushed but waited until the mortgage was foreclosed against which the New England, tied up as it was by the pending litigation, was helpless to protect itself. Whether, if let alone, it could have survived there is no proof nor can any one tell. But it is certain that it could not with this obstructing litigation pending. It became an easy victim of the New Haven road. And, that this was just what was intended is evident from the events as they followed each other, culminating, at last, in the New Haven taking over the litigation of Corbin's dummy. (Hearings, p. 407.)

Judge Kelly also testifies that Goldsmith's estate sued the Corbin estate for his expenses, and those expenses were paid by the New Haven road. (Hearings, p. 408.)

The suits brought and the nature of them are also explained by him. (Hearings, p. 409.)

It is clearly shown that as soon as the road was reduced to a state of helplessness, Corbin lost interest in it and did not want to put any more money into the litigation. This is quite evident from Judge Kelly's testimony. (Hearings, p. 411.)

Corbin first indemnified Goldsmith to induce him to commence the litigation, and then the New Haven road guaranteed payment of all expenses to induce Corbin to keep it going, and the attorneys were serving them throughout. They were all playing into the hands of the New Haven road and wrecking the New England for the benefit of the New Haven.

That this was the intention of Corbin from the beginning I have no doubt. Everything points in that direction. Judge Kelly says he did not know it. It is only fair to say that Mr. Brandeis did not. But the effect of such litigation was so transparently for the purpose of wrecking the New England road that it should have made a prudent and careful attorney suspicious that his services were being used for an improper purpose. He should have been doubly cautious and on his guard when he knew that the nominal plaintiff was not his client but that some one else, whose identity was concealed, had employed and was paying him for appearing.

It has been altogether too common, I am afraid, to bring suits in this way. It is a practice that should be condemned. It is a deception on the court and one means of encouraging and promoting litigation. If Mr. Corbin had been compelled to bring the suits in his own name they probably would not have been brought at all. It would have been a commendable and highly proper thing for his attorney to have said to him, "I will bring these suits in your own name, if you desire it, but I will not accept a retainer from you to prosecute them in the name of another man who is only your dummy and would not prosecute them at his own expense."

## THE EQUITABLE LIFE ASSURANCE SOCIETY CASE.

This case presents a remarkable state of affairs. Mr. Fox, one of the attorneys before the committee, thus stated the case:

Mr. Fox. The situation is this: It develops the utterances by Mr. Brandeis in the speech before a certain organization in Boston, at the time he was acting as and published as being made by "counsel" to a certain protective association, composed of persons who were policyholders in the Equitable Society, were incorporated in this court paper which he filed, in effect. Among these apparently was Mr. McSweeney, and we find Brandeis, Dunbar & Nutter Mr. McSweeney, one of the policyholders for services in connection with his policy, a certain amount. We shall, we suppose, through Mr. McClennen, with the aid of Mr. Anderson, prove a little more precisely the organization of this protective association. We then find later that the utterances or the acts which Mr. Brandeis charged in his speech as an individual as being iniquitous, he defends as counsel for the Equitable, taking a position at one time precisely contrary to the position taken later, not only as regards the legality, but the morality. (Hearings, p. 680.)

Some of the stockholders of the company being dissatisfied with the management organized amongst themselves a protective association, so called. Mr. Brandeis espoused the cause of these complaining stockholders and acted as secretary and adviser of the association without compensation. (Testimony of Whitman, p. 972.)

Mr. Whitman says the action of the stockholders was friendly and for the benefit of the company. As evidence of the state of comity existing and the friendly nature of the movement I quote from a speech delivered by Mr. Brandeis before the Commercial Club of Boston, October 26, 1905:

Mr. President and gentlemen, eight months ago dissension among guilty officers of the Equitable Life Assurance Society first directed public attention to the conduct of the life insurance business. Since then the disclosures of financial depravity have aroused widespread indignation; but even then the importance of the subject is not generally realized. \* \* \*

Such is the power which the American people have intrusted to the managers of these large companies. How has it been exercised? Substantially as all irresponsible power since the beginning of the world—selfishly, dishonestly, and in the long run, inefficiently. The breaches of trust committed or permitted by men of high financial reputation, the disclosure of the payment of exorbitant salaries and commissions, the illegal participation in syndicate profits, the persistent perversion of sacred trust funds to political purposes, the cooperation of the large New York companies to control the legislatures of the country—these disclosures are indeed distressing; but the practice of deliberate and persistent deception of the public which the testimony discloses, though less dramatic, is even more serious. \* \* \*

In the case of common criminals flight is accepted as confession of guilt. With financiers and business men falsification of books has hitherto been considered the strongest evidence of guilt. Yet the falsification of the books of these companies has been a persistent practice. Secret ledgers have been opened in which were entered questionable investments and more questionable expenditures. Hundreds of thousands spent "for legislative purposes" were charged up in real-estate account. So elaborate has been the system of fraudulent entries that after months of investigation the particular form of rascality embodied in the Equitable's \$685,000 Mercantile Trust Co., so-called "yellow dog" account has not yet been detected.

The degree of guilt involved in such transactions will be appreciated only when one remembers that the life insurance business beyond all others in the world rests upon confidence—confidence that in the remote, indefinite future the present sacrifice of the policyholder will bring protection to widow and children. (Hearings, p. 668.)

This must have been regarded as a friendly and playful reference to the methods of the company, for Mr. Brandeis was at that time and has been ever since the attorney of the company.

Mr. McClennen, one of the firm, testifies that no complaint whatever was made by the company of Mr. Brandeis's attack upon it. (Hearings, p. 684.)

He testifies also to the continued relation of attorney and client between the company and the firm and names a number of cases in which they appeared for the company all through this trouble and down to this time. (Hearings, pp. 684, 685.)

In one of the cases, namely, *Peters v. The Equitable Life Assurance Society*, the complaint charged some of the very things against the company that Mr. Brandeis so dramatically denounced in his commercial club speech. (See the bill in equity in that case, hearings, p. 670.)

In that case Brandeis, Dunbar & Nutter appeared for the defendant corporation and filed an answer denying all the charges made against it in the bill. (Hearings, p. 676.)

The position of Mr. Brandeis in his public utterances strongly condemning the company and his appearance for the company and his defense of it against like charges seem so inconsistent as to need explanation. Mr. McClennen, a member of the firm, has given his version of it, which is nothing more than a history of the proceedings in the matter without any explanation of their apparently inconsistent positions. (Hearings, pp. 697, 698.)

It appears from his testimony that the case first came to the notice of their firm August 25, 1906, about 10 months after the commercial club speech. It was probably one of the results of that agitation against the company and by rights might well have been prosecuted by Mr. Brandeis to vindicate his charges against the company.

#### GILLETTE SAFETY RAZOR CO. CASE.

Mr. Brandeis was charged with unprofessional conduct in certain cases concerning the stock of the Gillette Safety Razor Co., and evidence was offered to sustain the charge. I have been unable to see any reasonable ground of complaint of Mr. Brandeis's course in that case, taken as a whole. It was another struggle to get control of a corporation of which so many seemed to fall to the lot of Mr. Brandeis. They generally engender much ill feeling and charges and counter charges of misconduct, as they did in this case.

#### THE OLD DOMINION COPPER MINING & SMELTING CO. CASE.

This is another case in which Mr. Brandeis incurred the violent displeasure of some of the parties concerned. It began by his employment to oust Mr. Bigelow and his friends from the management of the company on the ground that Bigelow had wrongfully converted to his own use a large and valuable block of the stock of the company. Mr. Brandeis represented the complaining stockholders and his clients were successful in getting control of the company. Mr. Brandeis was then made the general counsel of the reorganized company and Chas. Sumner Smith, one of his stockholder clients, became its president. A consolidation or combination of the stock and operations of the Old Colony and the United Globe mines, owned by Phelps Dodge & Co., was proposed and the value of the stock of each of the companies became important. The directors of the Old Colony Co.

caused an investigation of the properties of the two companies to be made by an engineer and received a report from him showing that the stock of the Old Colony Co. was greatly more valuable than the other company. It was claimed that in the effort to induce the stockholders of the Old Dominion Co. to deposit and post their stock with that of the United Globe mines as of equal value, this report was concealed for a time from them by the directors and that this was done with the connivance and under the advice of Mr. Brandeis. There is no evidence to sustain this charge. It appears that Mr. Brandeis had nothing to do with the suppression of the report and that if he had there was sufficient reason for not making it public at that time, which was done a little later. (See testimony of William F. Fitzgerald and Charles Sumner Smith, hearings, pp. 1227, 1269.)

But another peculiar condition was disclosed in this transaction. After Bigelow was ousted there remained a claim against him for the stock alleged to have been converted by him. In the bringing together of the two companies this claim was not included, but was left to be prosecuted by the Old Colony Copper Mining & Smelting Co. In making the deal a new Old Colony Co. was formed as a holding company with which the stock of the two companies was deposited. Some of the stockholders of the Old Colony Copper Mining & Smelting Co. refused to go into the deal and did not deposit their stock with the holding company. It was left to Mr. Brandeis to work out a scheme that would take care of all parties concerned. In doing so he provided for trustees to handle and pay over to the stockholders the money that might be collected from Bigelow. The president of the Old Colony Copper Mining & Smelting Co., who had been one of Mr. Brandeis's clients in the fight for control of the company, was made one of the two trustees. In the trust agreement it was provided that the trustees should receive for their services 5 per cent of the amount collected on the Bigelow claim. In turn the board of directors agreed with Mr. Brandeis to pay him 10 per cent of any amount collected for his services. The effort to collect from Bigelow was successful, and Mr. Brandeis, with his 10 per cent and some other fees paid him for services in the matter, has received \$225,000 for his services and the trustees \$45,000 each. Thus the company has paid out for the collection and distribution of this fund to the stockholders \$315,000, besides large fees paid to other attorneys employed in New York. (Hearings, p. 1275.)

The trustees had nothing to do with the collection of the money. The suits were brought and prosecuted by the Old Dominion Copper Mining & Smelting Co. All the trustees did was to receive the money and pay it out to the stockholders. The fee received by Mr. Brandeis would seem large, at first blush, but I do not think it was an unreasonable charge. The amount recovered was something over \$2,000,000, and the litigation involved the bringing of suits in different State and Federal courts and covered several years reaching the Supreme Court of the United States. But the amount paid the trustees was unconscionable. They had practically nothing to do that could not have been done by any competent clerk or accountant at an expense of a few hundred dollars.

The only reflection that can justly be cast upon Mr. Brandeis in the whole transaction, as I see it, is that he devised this scheme, including the creation of this trust, and himself fixed the compensa-



tion of the trustees that has proved to be exorbitant. (Hearings, p. 1274.)

But there is nothing to show and no claim that Mr. Brandeis profited in any way by reason of this fact. He received his own fee, that was, in my judgment, well earned and nothing more.

There is nothing in this charge worthy of serious consideration.

#### THE MERGER CASE.

The Merger case, so-called, was an attempt on the part of the New Haven road to take over and absorb the Boston & Maine. One Mr. Lawrence was a very large stockholder in the Boston & Maine and was opposing the proposed merger and solicited Mr. Brandeis's assistance to prevent it. Mr. Brandeis's position in the matter is thus stated by his partner, Mr. McClennen:

The desire of the Lawrence interests was to prevent this, I will say, merger, as a short term, to express it. Mr. Brandeis was entirely in sympathy with that, but states that it appeared to him that it was a question of public policy of New England that deeply affected generally New England interests, the interests of the community of New England: that it would involve his taking public positions on the matter, and that he should prefer not to be hampered by being in the state of contemplation. (Hearings, p. 991.)

So Mr. Brandeis undertook the work as a public duty but, at the same time, paid the other members of his firm \$25,000 out of his own pocket as their fee for the services rendered by him. (Hearings, pp. 992, 995.)

In other words, Mr. Brandeis, by paying his partners a fee, recognized this as services rendered a private individual, but for himself personally he preferred to treat it as a public service that should be rendered without compensation. In this he took precisely the opposite course pursued by him in the Glavis case and one was quite as likely to create suspicion and criticism of his motives as the other. The fact that he was taking this course was concealed as his taking a fee in the Glavis case was concealed. (Hearings, p. 993.)

Naturally, as Mr. Anderson, who acted as Mr. Brandeis's counsel on the hearing though asked to act by the committee, says there "were insinuations in this record that he was appearing in the public interests and also privately." (Hearings, p. 992.)

That was precisely what he was doing. He took up the matter at the instance of Mr. Lawrence, represented his interests, and paid his partners for the services. So far as his appearance for Mr. Lawrence was concerned the situation would not have been in the least different as a matter of principle if Mr. Lawrence had paid the fee to all of the firm instead of his paying it to his partners. The only effect of this course, instead of the unequivocal one of taking compensation from Mr. Lawrence, was that Mr. Lawrence escaped the payment of a fee that was justly due from him and Mr. Brandeis was placed in an equivocal and questionable situation. The natural result was that ostensibly he appeared in the public interests only, and was suspected of bad faith, in that he was believed to be appearing in that way and being paid by private interests. It was just that suspicion that brought the transaction before the committee. On the other hand, if the truth had been made known, as Mr. McClennen now discloses it, the public would have suspected that the money he paid his partners was made up to him in some other way.

It was a position that no attorney should allow himself to occupy and one that, any way one can look at it, was bound to bring him under suspicion of his motives. Whether such a suspicion was justified or not, it put him in a false situation.

#### EMPLOYMENT BY LIQUOR DEALERS.

The governor of Massachusetts recommended to the legislature an amendment to the liquor law making it more certain as a means of promoting temperance in that State. Mr. Brandeis "was registered under the law as a" legislative counsel for the Protective Liquor Dealers Association and the New England Brewers Association to oppose the legislation. (Hearings, p. 1056.)

This was a long time ago, February, 1891. Public sentiment and individual opinions have greatly changed since then and one can not justly be judged by the present standards in dealing with the sentiments expressed. But the question was not one of prohibition but regulation of the liquor traffic.

Mr. Brandeis offered two drafts of bills favorable to the liquor dealers. (Hearings, pp. 1057, 1058.)

He also delivered a somewhat extended address in favor of his clients. He conceded the great evils flowing from the liquor traffic and that it should be regulated, but contended against the kind of regulation urged by the friends of temperance. (Hearings, p. 1058.)

He said:

The use of liquor is not a wrong. It is the abuse and not the use which is wrong, and, consequently, you must not allow yourself to be carried away by your emotions; you must not be misled by your indignation at the misery which liquor has produced.

He insisted that liquor must and would be sold and drunk, and the only question was, "How can the traffic be conducted with least injury to the inhabitants?" (Hearings, p. 1059.)

And the remedy he insisted upon was, "Make the liquor business respectable."

He said further:

If you will but recognize facts instead of closing your eyes to them, as these gentlemen of the Law and Order League have done; if you will accept the fact that liquor is desired by a large majority of the voters of the Commonwealth, and consequently that people will sell it; if you will recognize that and will make laws which do not necessarily harrass those engaged in the business; if you will let them conduct it respectably—as a majority of these people desire to conduct their business—if you will permit them to earn, not merely money, but what is more important, the esteem of their fellow men, the whole race of liquor-dealer politicians will soon pass away. The liquor dealers will become as inconspicuous in public life as the butchers and bakers. They will devote their leisure and their means to such enjoyments as others do, instead of seeking to control officials and elections by fair means or by foul. You made the liquor dealers politicians as you made them criminals when you passed laws which were unreasonable and clashed against the habits of the great mass of the people when you made their business precarious; when you selected that class of the community for invidious distinction and persecution. Repeal the obnoxious laws, and, when once you have removed the real cause of this evil—the unhealthy conditions—nature will lend its ever-ready aid, and the body politic will recover. (Hearings, p. 1064.)

The views expressed in this address differ very materially from my own, but I have no doubt they were shared by a very large proportion of the community at that time.

Besides, a man should not be condemned for expressing his views sincerely entertained. The vice of it is that these were not the views

of Mr. Brandeis, the citizen, expressed in the public interest. They were the paid-for sentiments of a lawyer advocating a change of the laws of his State in the interests of a business acknowledged by all thinking people to be injurious to the public welfare. It was a great moral question, up for legislation, and upon such no man should appear as the paid attorney of private interests.

#### PROTESTS.

Many protests against the confirmation of Mr. Brandeis have been received by the committee and recorded in the hearings. First was a list of 61. (Hearings, p. 319.)

Then came 16 others on separate protests stating their reasons for objecting to the confirmation. (Hearings, pp. 622, 623.)

They affirm a lack of judicial temperament and that "his reputation among a large number of the members of his own profession and of the people in general is such that he has not their confidence."

Another protest, signed by William H. Taft, Simeon E. Baldwin, Francis Rawle, Joseph H. Choate, Elihu Root, and Moorfield Storey, all of whom have been presidents of the American Bar Association, is in the following language:

TO THE SENATE COMMITTEE ON THE JUDICIARY:

The undersigned feel under the painful duty to say to you that, in their opinion, taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States. (Hearings, p. 1226.)

These protests, coming from men of high standing, many of them lawyers of high rank, should receive consideration in determining our course.

#### REPUTATION.

The protests to which I have referred placed their opposition in part upon the fact that Mr. Brandeis's reputation among a large part of the members of his own bar and others is not good.

The subcommittee permitted evidence to be adduced bearing upon the question of reputation but limited the number of witnesses to five on each side. As might be expected the witnesses differ widely as to this but all agree that amongst some of the members of the bar and others his reputation is not good. The witnesses for Mr. Brandeis claim that the reputation thus admitted is not general and not well founded. What they say on this subject, all of them admittedly men of standing and integrity, is worthy of attention.

Mr. Bailey gives it as:

First, that he is a very able lawyer; that he is a man of keen intellect; that he is an able advocate; that he is not entirely trustworthy. (Hearings, p. 153.)

Mr. Storey:

I think his reputation is that of a man who is an able lawyer, very energetic, ruthless in the attainment of his objects, not scrupulous in the methods he adopts, and not to be trusted. (Hearings, p. 271.)

Mr. Storey gives the names of a large number of lawyers and others who have expressed themselves unfavorably as to his reputation. (Hearings, p. 273.)

Mr. Whipple, in speaking of the Lennox case, said:

He was sincere about it, and it illustrates, to my mind, why you have heard about Mr. Brandeis from the Boston bar some things that you have heard. I think they have misunderstood him. That is my personal opinion, and I think if Mr. Brandeis had been a different sort of man, not so aloof, not so isolated, with more of the comradery of the bar; gave his confidence to more men, and took their confidence; said to them, when he was charged with anything that was doubtful, "Boys, what do you think about it?" and talked it over with them—you would not have heard the things you have heard in regard to him.

But Mr. Brandeis is aloof; he is intensely centered in carrying out his own ideas and his own ideals, which I believe are pure, which I believe are high-minded; and he does not, so far as I know, consult with anybody or take them into his confidence, and he will do things of a startling character. Nothing could illustrate it better than this Lennox matter. (Hearings, p. 300.)

And, again:

I think I have stated with sufficient clearness my belief that the opinion which has been expressed with regard to Mr. Brandeis in your hearings is founded upon a misconstruction of Mr. Brandeis's motives, because the thing that colors a man's acts usually is his motive. (Hearings, p. 305.)

And, in speaking of the men who have questioned Mr. Brandeis's reputation, he says:

As I remember that list, I do not think the motives of one of them could be impugned. I think they misunderstand Mr. Brandeis. I do not think that they are very much in sympathy with a great deal that he does. But I can not think of anyone in the list that I have seen who does not conscientiously believe just the statement which he signed. They are, all of them, very high-minded men. I do not think they are all of them very liberal or progressive men. I think they are conservative, and I think that anything that threatens or menaces the traditions which they revere, they think is worse than an iconoclast.

\* \* \* \* \*

I do not think one of them would sign that paper without the most deliberate and prayerful thought as to whether they were doing Mr. Brandeis an injustice, or whether by so doing they were discharging a public duty and that they were required to do it. They are all of a class in that respect. Men that would not for the world do a wrong or a harm to anybody else consciously; but, on the other hand, they have their conception of a duty, and that is if anyone is propagating mischievous propaganda that upsets the traditions in the community that we all revere it is a public duty to abate it. (Hearings, pp. 308-309.)

Mr. Pillsbury:

His reputation as it has come to me is that of a very active, adroit, and successful business lawyer; a man of unbounded audacity; a man if you wish to go into questions touching integrity—a man, I should say, of duplicity; double-dealing; a man who works under cover so that nobody ever knows where he really is or what he is really about. I have not ever heard him accused of cheating in money transactions. (Hearings, p. 654.)

Mr. Hutchins:

His general reputation at the bar is that he is a lawyer of great ability, but not straightforward. (Hearings, p. 611.)

Mr. Hall. Mr. Hall's estimate of Mr. Brandeis is in the form of a letter. He says:

First, then, so far as ability goes, there can be no question as to Mr. Brandeis's professional standing. He is universally acknowledged to be one of the ablest men at our bar, both in point of legal learning and of effectiveness, and if the question was of intellectual ability alone, his appointment would be generally approved.

There is, however, equally little question that he is not generally popular with the bar and that among a considerable proportion of the lawyers here he has the reputation of not being a man with whom it is pleasant to deal in business matters and one who is unscrupulous in regard to his professional conduct. Just how far there is any solid foundation for such a reputation it is extremely difficult to say.

So far as specific charges go, all of any consequence of which I have ever heard have been or will be brought to the attention of the committee at Washington, and of those it is unnecessary that I should speak, especially as I can add nothing of my personal knowledge.

The general reputation remains, and it is certainly one which is worthy of consideration in estimating the fitness of an appointment to the bench. Indeed, I think in the existing state of the feeling here that no one can be fairly criticized for opposing the appointment. (Hearings, pp. 619, 620.)

Mr. Hall explains how this reputation has grown up out of his idealism and the constant attacks that have been made upon him, and then says further:

Undoubtedly he is a merciless antagonist, fighting his cases up to the limit, and with great technicality, and taking every advantage which the law allows him, without perhaps always a keen regard for fair play. So far as I am aware, nothing more than this could he fairly considered as proved against him. On the other hand, there is, except among a comparatively small number of people, a general recognition that Mr. Brandeis has rendered public service to the community of extraordinary value, and that in doing so he has been actuated by disinterested motives. He lives with great simplicity, and has throughout his career devoted to unpaid public work a very large proportion of his time and energy. With the opportunities that have been open to him, he could, by following more conservative courses, have been a much richer man than he is to-day. I do not think it can fairly be doubted that he deliberately chose to serve the public rather than to devote himself entirely to making money, nor do I think it can be fairly questioned that in doing this he was actuated by high motives. (Hearings, p. 620.)

He recites the work that Mr. Brandeis has done in the public interest, and especially for the poor, and then says:

Of his fundamental honesty of purpose and his deep moral enthusiasm I feel absolutely sure. His qualifications for the position of Supreme Court judge far outweigh, in my judgment, anything which can fairly be urged against him. For these reasons I sincerely hope his nomination will be confirmed.

This gives, I think, a fair understanding not only of his idea of Mr. Brandeis's reputation but what Mr. Hall himself thinks about him and his qualifications.

Mr. Gregory. Mr. Gregory lives in Chicago and knows Mr. Brandeis in a general way and nothing of his reputation among the lawyers of Boston. He was for one year president of the American Bar Association. (Hearings, p. 710.)

He says of his reputation:

I think it is excellent as a lawyer of ability and character. (Hearings, p. 711.)

Mr. Walker. After reciting at considerable length the "fights" Mr. Brandeis had been in with the financial interests of Boston, he says:

I have never heard Mr. Brandeis criticized before these various matters that I have just referred to. His firm in Massachusetts certainly stood very high. I know Mr. Brandeis and know the members of his firm. (Hearings, p. 811.)

Mr. Adams had this to say:

I think there is quite unanimous assent that Mr. Brandeis is a very able lawyer of profound learning, but that upon the question whether he is and has been wholly straightforward in his practice there is a divided opinion. If I may analyze it, as I observe it, there is a group of men of high standing, like Gen. Peabody, in the community, who are in the network of State Street, which is our financial street, who state and think that Mr. Brandeis is not straightforward in his practice. I think those opinions, when traced, run into some one of these pockets of more or less publicity, namely, the Lennox case, the United Shoe Machinery case, the wrecking of the New England—those allegations. That is a fair statement as to that group. On the other hand, there is a large body of the bar, who, coinciding with what I have said as to his

being a very able lawyer, a man of profound learning, also believe that he is actuated by lofty purposes, is honest and trustworthy. That is all I have to say. (Hearings, p. 766.)

Mr. Peabody:

I think his reputation for ability is good. I think he is considered as a conspicuously able man; but, on the other hand, his reputation is that he is not always truthful, and that he is untrustworthy, and that he sails under false colors. (Hearings, p. 750.)

Mr. French:

Among the rank and file of the Boston bar and the Massachusetts bar, so far as I know them, Mr. Brandeis has, in my experience, the reputation of being a man of integrity, a man of honor, a man who is conscientiously striving for what he believes to be right. There are, of course, differences of opinion as to his beliefs in that respect. But that, in general, has been my experience with reference to the Suffolk bar, of which I am a member, and the Massachusetts bar, regarding his professional reputation. He has made enemies, of course. A man can not be combative as he is, or aggressive as he is, fighting as he has been on the firing line during all his professional career, without making many enemies. (Hearings, p. 770.)

Mr. Boynton:

That reputation, so far as I know it, is good. Down to the time this appointment was made I think the only thing that had ever come to my attention in any way reflecting upon Mr. Brandeis was certain printed matter circulated by the United Shoe Machinery Co. With that exception, I do not think I ever heard anything reflecting in any way upon his character as a man or as a lawyer.

I think I might say that the men of my acquaintance—two or three men who are my personal friends who have been very close to Mr. Brandeis—have spoken most warmly in his favor, and by that I mean before this investigation began. They would speak so now, I know. (Hearings, p. 771.)

I have tried to give as accurately as I can, from brief extracts, what was said by all the witnesses who testified on this subject. I hope none of them have been overlooked.

But this analysis of the evidence of what Mr. Brandeis's reputation is would not be complete without reference to what was said by some of the men who have worked with him in the effort to better social and economic conditions and help the poor.

Edmund A. Whittier testifies to his generous work, without compensation, for the American Fair Trade League, which is a business organization seeking legislation. (Hearings, p. 812.)

Newton D. Baker, since made Secretary of War, spoke very highly of his work for the poor and laboring classes and particularly the National Consumers' League, and submitted a memorial numerously signed in his behalf. (Hearings, pp. 759, 760.)

Henry Moskowitz spoke very earnestly in commendation of Mr. Brandeis's work for the board of arbitration of the garment-working industries of New York, of which Mr. Brandeis was chairman. (Hearings, p. 763.)

It is evident that while Mr. Brandeis has many enemies among business men and lawyers who do not believe in him, he has many friends among the poor and lowly and those who are working to better their condition.

#### CONCLUSIONS.

I have endeavored to make a fair and full statement and analysis of the evidence. I have done so largely to aid me to comprehend and apply it and thereby reach a just conclusion. It has led me irresistibly

to conclude that the nomination should be rejected. For many reasons I should be glad to find otherwise. I am greatly in sympathy with much of the work that Mr. Brandeis has been doing to better economic, industrial, and social conditions. Much of this I am convinced he has done generously, unselfishly, and for the common good. Much of it he has done in ways and by means that do not appeal to me at all. He has in many instances been intolerant and offensive in his methods, as the evidence shows. He has resorted to concealments and deception when a frank and open course would have been much better and have saved him and his profession from suspicion and criticism. He has defied the plain ethics of the profession and in some instances has violated the rights of his clients and abused their confidence. There is nothing in the evidence that leads me to think he has done these things corruptly or with the hope of reward. His course may have been the result of a desire to make large fees, but even this is not clear. He seems to like to do startling things and to work under cover. He has disregarded or defied the proprieties. It has been such courses as he has pursued that have given him the reputation that has been testified to, and it is not undeserved. It is just such a reputation as his course of dealing and conduct would establish in the minds of men. This reputation must stand as a strong barrier against his confirmation.

If it were Mr. Brandeis alone that is to be concerned, and it should be believed that this reputation is undeserved and unjust, it should have no weight; but the effect of such an appointment on the court is of much greater importance. To place a man on the Supreme Court Bench who rests under a cloud would be a grievous mistake. As I said in the beginning, a man to be appointed to the exalted and responsible position of justice of the Supreme Court should be free from suspicion and above reproach. Whether suspicion rests upon him unjustly or not his confirmation would be a mistake. It is argued against him that he is not possessed of the judicial temperament. There is just ground for this objection. As some of his friends said he is a radical, and for that reason he has offended the conservatives. That may be no cause of reproach; but the temperament that has made him many enemies and brought him under condemnation in the minds of so many people would detract from his usefulness as a judge. He is of the material that makes good advocates, reformers, and crusaders, but not good or safe judges.

Taking all these things into consideration, I submit that the nomination should be rejected, and so report.

JOHN D. WORKS.

APRIL 3, 1916.





















